



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

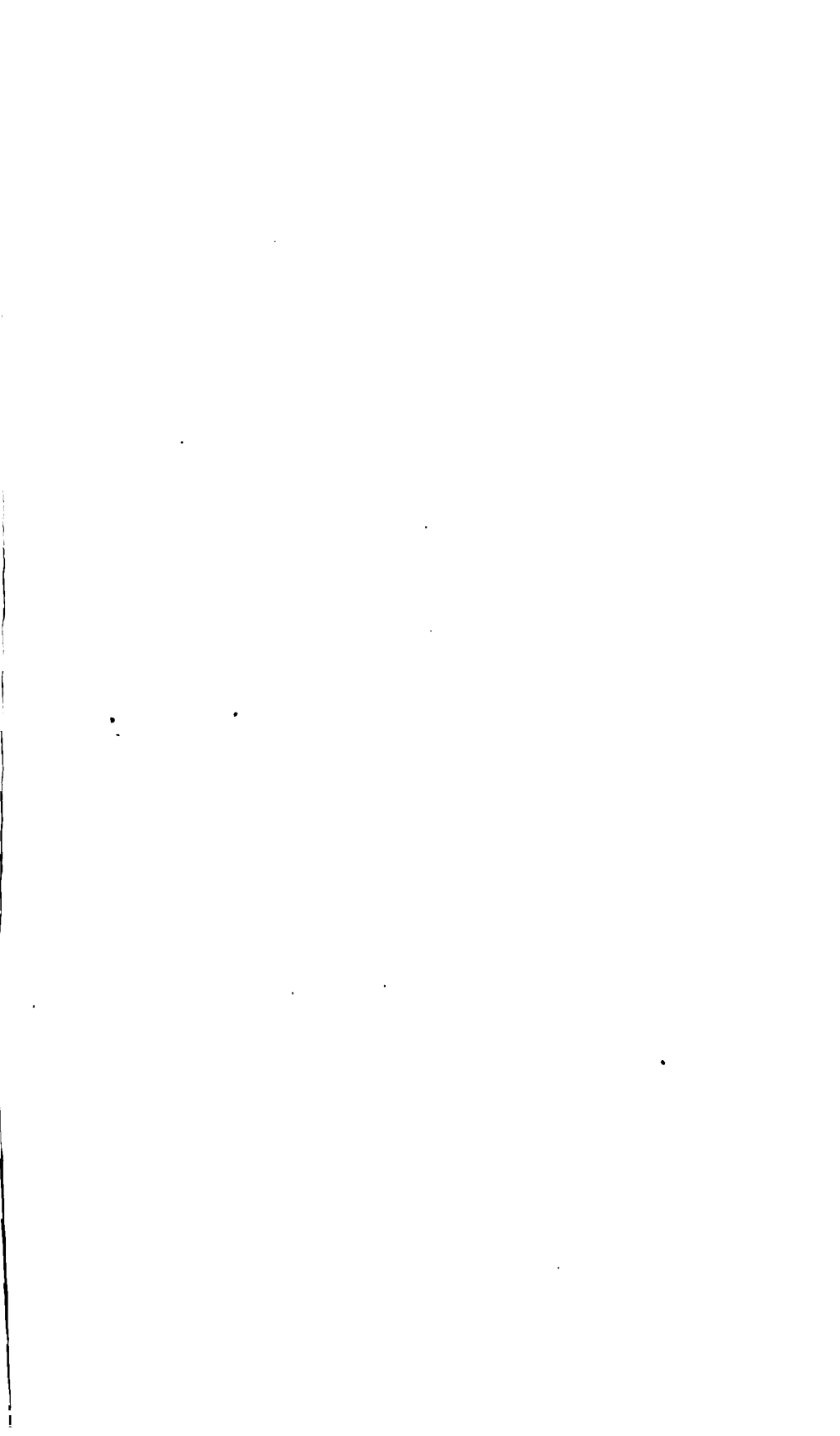
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD UNIVERSITY LIBRARY





Hamilton Fish.

REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN
THE SUPREME COURT,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
OF THE
STATE OF NEW-YORK.

BY ESEK COWEN,
Counsellor at Law.

~~~~~  
VOL. III.  
~~~~~

ALBANY:
PUBLISHED BY WILLIAM GOULD & CO.
LAW-BOOKSELLERS,
NO. 94, STATE-STREET, SIGN OF LORD COKE;
AND BY GOULD & BANKS,
LAW-BOOKSELLERS,
CORNER OF NASSAU AND SPRUCE STREETS, OPPOSITE THE CITY-HALL,
NEW-YORK.

G. M. Davison, Printer—Saratoga Springs.

1825.

Southern District of New-York, ss.

BE IT REMEMBERED, that on the 20th day of April, A. D. 1825, in the forty-ninth year of the independence of the United States of America, Gould
L. S. and Banks, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court, and in the Court for the Trial of Impeachments and the Correction of Errors of the State of New-York. By Esq Cowen, Counselor at Law. Vol. III."

In conformity to the act of Congress of the United States, entitled "An act for the encouragement of Learning, by securing the copies of Maps, Charts and Books, to the authors and proprietors of such copies, during the time therein mentioned." And also to an act, entitled "An act supplementary to an act, entitled an act for the encouragement of Learning, by securing the copies of Maps, Charts and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New-York.

JUNE 11-1929

5-65
7/2/41

A

TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

—

[The letter *v* follows the name of the plaintiff.]

—

A			
	PAGE.		
Adkins v. Brewer,	206	Bissell v. Hopkins	166
Albany, Ex parte	358	Blue v. Stout	354
Allen, Jackson, <i>ex dem.</i> Blanchard v.	220	Bradford v. Consaulus	128
American Insurance Company,		Brewer, Adkins v.	206
Whitney v.	210	Bridgewater v. Brookfield	299
Archibald v. Thomas	284	Brinckerhoff, Thallhimer v.	623
Atkins, Stewart v.	67	Brookfield, Bridgewater v.	299
Avery v. Curtiss	369	Brown v. Hankerson	70
		Bryar v. Wilcocks	159
		Buckby, Gardner v.	120
		Burr v. Van Buskirk	263
		Burt, Stone v.	379
		Bush, Clark v.	151
		Bush, Cowen v.	343
		Butler, Lent v.	379
		Butler, People v.	847
			C
Backus v. Smith	344	Camp, Woolsey v.	358
Ball, Rowley v.	303	Cande, Chichester v.	39
Bank of Utica v. Smedes	662	Carpenter, Jackson, <i>ex dem.</i>	
Barber, Rew v.	272	Allen v.	22
Barker v. The People	686		
Barclay, Vienna v.	281		
Bates, Rose v.	28		
Beard v. Van Wickles	335		
Bennet v. Davis	68		

TABLE OF THE CASES.

Carter, Clarkson v.	84	G	
Chamberlin v. Day	353		
Chapman, Jackson, <i>ex dem.</i>		Gale, Jackson, <i>ex dem.</i> Por-	
Hadley v.	390	ter v.	24
Chase, Sanford v.	381	Gardner v. Buckby	120
Chew, Jackson, <i>ex dem.</i> Eden v.	298	Garnsey, Jackson, <i>ex dem.</i>	
Chichester v. Cande	39	Pioneer v.	385
Clark et al. exrs. v. Bush	151	Gay v. Patterson	29
Clarke, Ex parte	379	— v. Rogers	368
Clark v. Rathbun	380	Gilbert, Matter of	59
Clarkson v. Carter	84	Goodrich v. Woolcott	231
Clute v. Van Slyck	17	Grant v. Root	354
Collins, Jackson, <i>ex dem.</i> Sco-		Gregory, Colt v.	22
field v.	89	Griswold v. Stewart	16
Coleman, Rogers v.	62	— v. National Ins. Co.	96
Columbia, Bank of v. Souther-			
land	336	H	
Colver, Cutler v.	30		
Consaulus, Bradford v.	128	Hall v. Rochester	374
Cowen v. Bush	343	Hankerson, Brown v.	70
Cowles, Nichols v.	345	Harris, Jackson, <i>ex dem.</i> Wor-	
Cromwell v. Van Rensselaer	346	den v.	241
Crowell, Robertson v.	13	Hasbrouck v. Schoonmaker	346
Curtiss, Avery v.	369	Hill, Ex parte	355
—, Tompkins v.	251	Honsenfratts. People v.	26
Cutler v. Colver	30	Hooker, Jackson, <i>ex dem.</i> Gor-	
		man v.	15
D		Hopkins, Bissell v.	166
		Houghtaling, Williams v.	86
Davis, Bennet v.	68	Hurd, Matter of	35
—, M'Kinstry v.	339		
Day, Chamberlin v.	353	I	
Delancy, Seymour v.	445		
Deyo, Kelsey v.	133	Ingersoll, Mirwan v.	367
Doty, Nichols v.	352		
		J	
E			
		Jackson, <i>ex dem.</i> Allen, v. Car-	
Eastman, Marsh v.	58	penter	22
Erwin, M'Clure v.	313	— Blanchard v. Allen	220
		— De Forest v. Ramsay	75
F		— Dox v. Jackson	73
		— Eden v. Rathbone	291
Fox v. Johnson	20	— v. —	296
— Smith	23	— v. —	373

TABLE OF THE CASES.

ix

Jackson, <i>ex dem.</i> Eden, v. Chew	298	Marsh, The People v. —, Matter of	334 69
— Gorman v. Hooker	15	Mascraft, Matter of	334
— Hadley v. Chapman	390	Matthews, Williams v.	252
— Livingston v. Thurs- ton	342	M ^c Chesney, Small v.	19
— Palmer v. Travis	356	M ^c Clure v. Erwin,	313
— Pioneer v. Garnsey	385	Merchant, Raymond v.	147
— Porter v. Gale	24	Miller, Jackson, <i>ex dem.</i> Will- iams v.	57
— Scofield v. Collins	89	Mirwan v. Ingersol	367
— Smith v. Stiles	356	M ^c Kinstry v. Davis	339
— Titus v. Jones	17		
— Williams v. Miller	57	N	
— Worden v. Harris	241		
Jackson, Jackson, <i>ex dem.</i> Dox v.	73	National Insurance Company, Griswold v.	96
Jansen, admr. v. Tappen	34	Nichols v. Cowles	345
— v. —	339	— v. Doty	352
Johnson, Ex parte	371	North River Steam Boat Com- pany v. Livingston	713
—, Fox v.	20		
— v. Rogers	14	O	
Jones, Jackson, <i>ex dem.</i> Ti- tus v.	17	Osgood v. The Manhattan Com- pany	611
K		P	
Kellogg, Ex parte	372		
Kelsey v. Deyo	133	Patterson, Gay v.	29
Kenney, Udall v.	590	People, Barker v.	686
King, Van Lew v.	375	People v. Butler	347
Knickerbacker v. Shipherd	383	— v. Honsenfratts	26
L		— v. The Marine Court	366
Lawyer, Tunnicliff v.	382	— v. Marsh	334
Lent v. Butler	370	— v. Richardson	357
Livingston, N. R. Steam-Boat Company v.	713	— v. Thurman	16
M		R	
Macanley v. Sternburgh	368	Ramsay, Jackson, <i>ex dem.</i> De Forest v.	75
Manhattan Company, Osgood v.	611	Rathbone, Jackson, <i>ex dem.</i> Eden v.	291
Mann v. Swift	61	—, —	296
Marine Court, The People v.	366	—, —	373
Marsh v. Eastman	58	Rathbun, Clark v.	380
		Raymond v. Merchant,	147

CASES IN THE SUPREME COURT.

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF NEW-YORK,
DURING THE PERIOD OF THESE REPORTS.

JOHN SAVAGE, *Chief Justice.*
JACOB SUTHERLAND, } *Justices.*
JOHN WOODWORTH, }

CIRCUIT JUDGES.

FIRST CIRCUIT.
OGDEN EDWARDS.

SECOND CIRCUIT.
SAMUEL R. BETTS.

THIRD CIRCUIT.
WILLIAM A. DUER.

FOURTH CIRCUIT.
R. HYDE WALWORTH.

FIFTH CIRCUIT.
NATHAN WILLIAMS.

SIXTH CIRCUIT.
SAMUEL NELSON.

SEVENTH CIRCUIT.
ENOS T. THROOP.

EIGHTH CIRCUIT.
WM. B. ROCHESTER.

SAMUEL A. TALCOTT, *Attorney General.*

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK,

IN AUGUST TERM, 1824, IN THE FORTY-NINTH YEAR OF OUR INDEPENDENCE.

ROBERTSON against CROWELL, impleaded with PADD and SNOWDON.

ASSUMPSIT. The defendant, *Crowell*, pleaded the general issue, and gave notice, with that plea, that he should, on the trial, give in evidence his discharge under the act for abolishing imprisonment for debt in certain cases; and, at the last Circuit Court in the city of *New-York*, the cause coming on to be tried, the discharge was accordingly offered in evidence; but the Circuit Judge, supposing this to be the subject of a special application to this Court, overruled the evidence, and directed a general verdict for the plaintiff; and now,

W. Thompson, for *Crowell*, moved that the judgment to be rendered be qualified and confined to the property of *Crowell*, so that no execution issue against his body.

To avail himself of a discharge of the person from imprisonment, the defendant should plead such discharge; or he may give it in evidence on the trial, and if found valid, this finding should make a part of the *postea*, on which a modified judgment may be entered.

But where this course was overruled by

the circuit judge, and the plaintiff did not express a desire to contest the discharge at the circuit, nor impeach it by affidavit, on motion, in the supreme court, to have the judgment qualified, the motion was granted.

CASES IN THE SUPREME COURT

UTICA,
Aug. 1824.

Johnson
v.
Rogers.

W. King, contra, said that by allowing the discharge to be introduced on a summary application, the plaintiff was deprived of all opportunity to contest its validity before the jury. *Crowell* had a chance to prove, and have it tried at the Circuit, and it is now too late. (*Palmer v. Hutchins*, 1 *Cowen's Rep.* 42.) If the Judge erred, the proper course was to make a case, and bring up the question in that form.

[WOODWORTH, J. You did not dispute the validity of the discharge at the Circuit.

SAVAGE, Ch. J. Do you now deny this by affidavit ?]

King. We do not deny it, because we supposed this to be the wrong time for doing so.

Curia. The Judge should have received evidence of the discharge, and on the jury finding in favour of its validity, this should have been endorsed as a part of the postea, and returned ; upon which the plaintiff should have taken his judgment so modified as not to reach the defendant's person. But the discharge was not contested at the Circuit, nor is it now questioned. We, therefore, grant the application, under the special circumstances of this case.

Motion granted.

JOHNSON against ROGERS and ROGERS.

The affidavit to change the venue must state the advice of counsel as to the materiality of the witnesses.

E. COWEN moved to change the venue, in this cause, from the county of *Warren* to the county of *Saratoga*, on an affidavit, in which one of the defendants swore that he had upwards of 20 material witnesses residing in the latter county, and in counties south of this. He also swore that he had a good and substantial defence, on the merits, as he was advised by counsel and verily believed ; but the affidavit did not state that *he was advised by counsel that his witnesses were material* ; and, for this omission,

R. Weston opposed the motion.

Curia. We require the same strictness, in this respect, as in shewing the defence on the merits generally. The party must, in both cases, swear to the advice of counsel.

UTICA,
Aug. 1824.

Jackson
v.
Hooker.

Motion denied with costs.

JACKSON, *ex dem.* GORMAN, against HOOKER.

THE plaintiff having made default in trying this cause, pursuant to notice for that purpose, at the first Circuit after issue joined, the plaintiff's attorney told the defendant's attorney that if he would make out his bill of costs he would pay it, and stipulate to try at the next Circuit. This he did not do, but now moved for judgment as in case of nonsuit.

S. Forman, for the motion.

D. Woods, contra.

Curia. The plaintiff's attorney must now stipulate, and pay the costs of the Circuit, but the defendant must pay the costs of this motion. Applications to this Court should certainly be discountenanced, where we cannot but see that the party might have taken the full effect of his application without coming here. A formal tender of the money or stipulation was not necessary till the defendant had made out his bill of costs. There is no pretence that the offer of the plaintiff's attorney was not in perfect good faith, and we consider the proceeding on his part as equivalent to a tender.

After first default in trying cause, plaintiff offers, if defendant will make out his bill, to stipulate and pay costs of circuit.

Defendant does not make his bill, but moves for judgment as in case of nonsuit; and rule that plaintiff stipulate and pay costs of circuit, but that defendant pay costs of motion.

Applications to this court, in cases where a party may have the effect of his motion without coming here, are to be discountenanced.

Rule accordingly.

CASES IN THE SUPREME COURT

UTICA,
Aug. 1824.

Griswold

v.

Stewart.

THE PEOPLE *against* JAMES L. THURMAN.

The people cannot be nonsuited.

In this respect, as well as in many others, they enjoy the prerogatives of the British crown.

D. RUSSELL, for the defendant, moved for judgment as in case of nonsuit.

W. H. Maynard, *contra*, objected, that judgment of nonsuit cannot be rendered against the people.

Russell said the suit was prosecuted for the benefit of one V. B. and he wished the Court to make such an order in this matter as finally to dispose of it, even if they could not render a technical judgment of nonsuit; but it not sufficiently appearing, by the affidavits which he produced, that this was the case, and these affidavits not having been served on V. B. and he having no notice of this motion,

The Court declined interfering. They said the prerogatives of the people were in this, and many other respects, similar to those of the British crown. In this point of view they cannot be nonsuited.

Motion denied.

GRISWOLD *against* STEWART and others.

Where there are several issues in law joined at different times, in the same cause, its order on the calendar is determined by the date of the first issue.

THE defendant pleaded four pleas, and in October, 1821, there was a demurrer to the first, and joinder, and issue on the others. Afterwards the defendants amended the first plea, but the plaintiff again demurred, and there was a joinder in demurrer on the 5th February, 1822. Afterwards a further plea was interposed, by leave of the Court, on special application, to which the plaintiff demurred, and there was a joinder in demurrer thereon in May last; and the plaintiff's attorney had noticed the cause for argument at this term, and placed it on the calendar according to the date of the first issue in law; and on the first day of this term;

D. Kellogg, for the defendants, moved to correct the calendar by placing it according to the date of the last issue.

UTICA,
Aug. 1824.

J. Lynch, contra.

Jackson
v.
Jones.

Curia. The cause is correctly placed at the date of the first issue.

Motion denied.

CLUTE against VAN SLYCK.

On certiorari. The defendant, being Sheriff of the county of *Schenectady*, was sued before a Justice of the Peace, for an escape of a prisoner upon execution; and the Justice gave judgment in his favour. On certiorari to this Court the judgment was affirmed; and now,

The statute, (1 R. L. 155, s. 1) giving the sheriff, &c. double costs, on verdict, &c. in his favour, does not apply to a proceeding upon certiorari.

N. F. Beck moved for double costs, upon the statute, (*sess.* 24, ch. 47, s. 1, 1 R. L. 155.)

S. A. Foot, contra, said the statute did not apply to a proceeding on certiorari; that it contemplated an action in which there could be a verdict or discontinuance, or a non-suit.

Curia. We do not think the statute applies to this case.

Motion denied.

JACKSON, *ex dem.* TITUS, against JONES.

A. CONKLING, for the plaintiff, moved for a rule that the defendant cause two certain deeds, described in the affida-

Rule made that the defendant deposit deeds, which

he relied on in defence of an ejectment brought against him, in the clerk's office of *M.* to the end that the plaintiff might, with witnesses, inspect the same.

This rule made on affidavit of the lessor of the plaintiff that he expected thus to be enabled to prove the deeds forgeries.

UTICA,
Aug. 1824.

Jackson
v.
Jones.

vits whereon he moved, to be deposited in the Clerk's office of the county of *Monroe*, or in such other place as the Court should direct, to the end that the lessor of the plaintiff and his witnesses might have access thereto. This motion was founded on various affidavits, by which it appeared that the defendant relied on these deeds for his defence in this action, and on an affidavit of the lessor of the plaintiff, that he expected to be able to prove, with proper opportunity for that purpose, that both the deeds were forgeries.

A. Samson, contra, opposed the motion as unprecedented. It might go to convict the defendant of forgery, and the Court will never require a party to furnish his adversary with the means for this purpose. He also read an affidavit of the defendant, that he had control of but one of these deeds, and that the other would be necessary, as he was advised by his counsel and believed, in the execution of a commission which had been issued in this cause ; but he did not swear that he would not use both deeds on the trial.

The Court granted a rule, that the deeds should be deposited with the *Monroe* County Clerk, for the purpose mentioned on the motion, 8 days before the next Circuit in *Monroe*. They said this would give time for first using the deeds on the execution of the commission.

RULE. On, &c. ordered, that the said defendant, *Samuel Jones*, cause the deeds from *Nathan Wood* to *David Wood*, and from the said *Nathan Wood* to *Seth Jones*, in the affidavit of the lessor of the plaintiff mentioned, to be deposited, at least 8 days before the next Circuit Court to be held in and for the county of *Monroe*, with the Clerk of the said county.(a)

(a) Mr. C. Graham, (in whose behalf Mr. Conkling moved) furnished him with a note of the following case: MS. "JOHN BRUSH V. THOMAS GIBBON. In August term, 1811. Mr. Graham, upon an affidavit of the defendant, stating that the suit was upon a note of \$5000, alleged to have been made by him, but that he never signed the same, and believed it to be a forgery, and that he could prove it to be so, if the Court would direct

it to be deposited in some place where his witnesses could have reasonable access to it, moved for an order upon the plaintiff to deposit the note with one of the officers of the Court, or the Recorder of *New-York*. The motion was opposed; but

UTICA,
Aug. 1824.

Small
v.
M'Chesney.

The Court granted it, and ordered the note to be deposited with the Clerk of the Supreme Court; and that the defendant's witnesses should have access to it, for the purpose of examining it."

See 2 *Cowen's Rep.* 590, note (n) to *Denslow et ux. v. Fowler*, where the cases to this point are collected; and see, also, *The People v. Commissioners of Newcastle*, *id.* 623. For a summary of the English practice as to compelling the production and inspection of papers in the hands of the adverse party, whether they be publick or private papers, see 1 *Archb. Pr.* 144, 145; 2 *id.* 196, 197.

SMALL against M'CHESNEY.

M. HOFFMAN, moved to set aside the execution and subsequent proceedings in this cause. He shewed, by affidavit, that the execution had issued against the defendant and been levied before the record of judgment, which was by bond and warrant of attorney, had been filed; that is to say, the execution was issued and levied between 2 and 4 o'clock in the morning of the 13th July, 1824, whereas the judgment was not signed till about 11 o'clock of the same morning, and the record was not filed till 4 P. M. of the same day.

The law will not notice the fractions of a day, as between the parties, in order to determine whether the judgment record was filed before execution issued, unless to prevent actual injustice.

He relied upon *Barrie v. Dana*, (20 *John.* 309) and *Lemon v. Heirs of Staats*, (1 *Cowen's Rep.* 592.) The Court said, in the latter case, they would examine the fractions of a day when necessary for the purposes of justice; and it is surely so here. Had the defendant been allowed time to pay the money till the record was filed, perhaps no execution would have been necessary.

L. Ford, contra, said that *Barrie v. Dana* was the case of an execution issued several days after the record filed. Fractions of a day were not in question.

Curia. The party who moves has sustained no injury by this proceeding. He does not shew that the money would

UTICA,
Aug. 1824

Fox
v.
Johnson.

have been paid, and farther costs prevented, had execution been delayed till after the filing of the record. The whole proceeding is on the same day, which the law will not divide into fractions, unless this be necessary for the purpose of guarding against injustice. Here has been none. The objection is merely technical, and the technical answer is enough where there has been no injury from the proceeding.

Motion denied.

Fox against JOHNSON.

A return to a certiorari will be set aside, if it be drawn by the attorney for the plaintiff in error.

ON certiorari from a Justice's Court.

I. Seelye, moved to set aside the return to the certiorari in this cause, with all subsequent proceedings, upon an affidavit of the defendant's attorney, that the Justice who tried the cause in the Court below informed him that one of the attorneys for the plaintiff in error drew his return. He cited *Rudd v. Baker*, (7 John. 548.)

S. A. Foot, contra, read an affidavit of the Justice, stating that he delivered the certiorari, and a copy of the affidavit upon which it was founded, to the attorneys for the plaintiff in error, and requested them to draw the return; that this was without any previous request or solicitation, for that purpose, by them or either of them; that one of them did draw the return, which he read over to the Justice, and the same being correct, he signed it. He also read an affidavit of one of the attorneys for the plaintiff in error, who drew the return, confirming the Justice's affidavit.

He said that *Rudd v. Baker* was the case of an officious intermeddling on the part of the attorney; but the present is a case of plain, honest dealing. The Justice may employ such agent as he pleases to draw up his return. If it be false he is accountable.

WOODWORTH, J. He should have employed some one other than the attorney for the plaintiff. The practice of resorting to the attorney for the plaintiff in error is a dangerous one. It is liable to great abuse, being in the hands of one who is interested to reverse the judgment. The rights of the defendant in error are concluded by the return, who must submit, or be put to the expense and delay of an action, if the return be false.

UTICA
Aug. 1824.

Fox
v.
Johnson.

SUTHERLAND, J. It is our duty to reject this return, on the same principle that we refuse to hear an affidavit, taken before the attorney in the cause. It might be different, if the attorney simply wrote what the Justice dictated, acting the part of a mere *amanuensis*.

Foot. The present case is little, if any thing, beyond that.

WOODWORTH, J. If the Justice dictated the return, it was very easy to say so in the affidavits.

Foot. The rule which the Court appear inclined to establish, would hardly allow the attorney to correct a clerical or grammatical inaccuracy, or to make a copy of the return.

SAVAGE, Ch. J. That would, perhaps, be a different case, but the attorney here draws the whole return, upon the general request of the Justice. We are all clearly in favour of the motion.

Motion granted.

UTICA,
Aug. 1824.

Jackson
v.
Carpenter.

COLT against GREGORY.

On moving to set aside proceedings against an attorney, for irregularity, because they were as against a common person, the attorney need not state in his affidavit that he was a *practising* attorney, &c.

But it is enough that he swear he was an attorney, which throws it upon the other party to shew that he had not practised within the year.

E. GRIFFIN, moved to set aside the judgment against the defendant, and all subsequent proceedings; and he read an affidavit of the defendant, stating, that "at the time of issuing the *capias ad respondendum* in this cause, and for a long time before, and ever since, he has been and still is an attorney and counsellor of this Court." The affidavit then set forth that a *capias* had been served on the defendant, but without serving any other papers, either on him or his agent; that the plaintiff's attorney had treated him as a common person, and proceeded to judgment.

Ostram, objected that the affidavit did not state that he was a *practising* attorney at the time of the suit brought.

Curia. This was not necessary. He swears that he was an attorney and counsellor, and this is sufficient, *prima facie*, to show that he had practised within the year. If otherwise, it lay with the plaintiff to shew it.

Motion granted.

JACKSON, *ex dem.* ALLEN and others, against CARPENTER.

Proceedings stayed till the costs paid, in a suit for the same cause in the circuit court of the United States.

J. LYNCH, for the defendant, moved to stay proceedings in this cause, until the lessors of the plaintiff had paid certain costs incurred by the one under whom the defendant is in possession, in prosecuting an action of ejectment against the tenant of the lessors, for the same premises, in the United States District Court of the Northern District of New-York, wherein the title of the present lessors was in question through their tenant, and wherein the plaintiff succeeded. He insisted that this came within the case of *Jackson v. Edwards*. (1 Cowen's Rep. 138.)

B. F. Butler, among other grounds of opposition to the motion, mentioned that the first suit was in a Court proceeding under the constitution and laws of the *United States*, and submitted whether, being under another government than that under which this Court acts, they would so far notice the proceeding there as to interfere in this manner; but he did not much insist upon that ground.

UTICA,
Aug. 1824.

Fox
v.
Smith.

Lynch, in reply, cited *Perkins v. Hinman*, (19 John. 237) where this Court stayed the proceedings in a suit here for the same cause as one which had before been brought in the Common Pleas, till the costs of the first were paid.

The Court, without assigning their reasons on this point, granted the motion.

Motion granted.

Fox against SMITH.

E. GRIFFIN, for the defendant, moved to set aside the verdict in this cause, which was rendered for the plaintiff at the last *Jefferson Circuit*, under the following circumstances: The trial not being closed till evening, it was agreed by the counsel for the parties, that the jury might bring in their verdict sealed the next morning, which was accordingly done. On the jury coming into the box the next morning, and presenting their verdict sealed, the defendant's counsel requested of the Judge to have the jury polled, which he denied, and the verdict was recorded.

The jury may be polled at any time before the verdict is recorded, at the instance of either party, whether it be a sealed or oral verdict.

C. P. Kirkland, contra, said he found nothing in the English cases which authorized the polling of a jury under any circumstances. If the right arises from the nature and constitution of juries, and because the party has a right to see that it is the separate verdict of each as well as that of the whole, here he has the proper evidence of that by an arrangement to which he was a party, by which the jurors each affix their hand. In the case of *Root v. Sherwood*, (6 John.

UTICA,
Aug. 1824.

Jackson
v.
Gale.

Rep. 68) the only question was, whether the Circuit Judge has the power to poll the jury. His power was established by that case, but it is a matter of discretion with him. An unqualified right to poll the jury, by a party who has had every chance to tamper with them, might lead to the greatest abuse. In *Blackley v. Sheldon*, (7 John. 32) it is said the jury may be examined by the poll, *if the Court please*; and again, "If the verdict be delivered in writing, as it was here, the Justice had a right to permit the verdict to be taken by the poll."

WOODWORTH, J. Conceding that the Judge may order the jury polled, seems to give the party a right to insist on it. I think this cannot be a matter of mere discretion. It has been the uniform practice at the Circuit, as far as I have been acquainted with it, to allow the jury to be polled, whether the verdict be sealed, as here, by consent, or delivered *ore tenus* by the foreman.

Curia. We think the jury may be polled, at the instance of either party, at any time before the verdict is recorded, whether it be sealed, by consent, or is *oral*.

Motion granted.

JACKSON, *ex dem.* PORTER and others, *against* GALE.

On re-taxation of costs in ejectment, and case made for argument, the following items allowed: Serving *narr.* Rule for *remanet*—atty's fee on argument for each term at which noticed—dr. judgt. record, fol. 4, and same in N. P. record—*fi. fa.* for costs—fee on serving writ of possession. Motion and rule for argument disallowed.

THE plaintiff having recovered in ejectment, on verdict and a case made and argued, the commissioner had taxed the following, among other items, in the bill of costs:

Serving <i>narr.</i>	\$1,00
Mo. and rule for argument,	68½
Rule for <i>remanet</i> ,	72½
Atty's fee on argument, (<i>several terms</i>),	3,75
Drawing judgment record, fol. 4, at 19,	76

Sheriff's fees on serving writ of possession, with aid, &c.	3,75
<i>Et. fa.</i> for costs,	1,32

UTICA,
Aug. 1824.

Jackson
v.
Gale.

J. C. Spencer, for the defendant, moved for a re-taxation. He did this, he said, principally with a view to the attorney's fee on argument, which here amounted to a large sum, as the cause had been noticed for argument a great number of times, and an attorney's fee charged for each term. He insisted, that the attorney would be entitled to but one fee on argument, and this for the term at which the cause was, in fact, argued. The phrase providing for the allowance of this fee, differs from the one which allows a fee to counsel. The latter is, *attending prepared for argument*—the former is, *arguing*, &c. (2 R. L. 15, 16.)

A. Samson, contra.

Curia. It is reasonable that this fee should be allowed for each term at which the cause is noticed for argument. The attorney attends, whether he succeed in reaching the cause on the calendar or not. The other items are correct, with the exception of that for serving writ of possession, which must be reduced to \$1.25, and motion and rule for argument, which must be stricken out. The only objection against the *et. fa.* for costs is, that it might have been incorporated into the writ of possession. This is true, but the party may also elect to proceed with it separately. Though the 4 folios are drawn for the *nisi prius* record, yet it is necessary to make another draft when the judgment roll comes to be framed. It is no objection that a similar charge was allowed in the *nisi prius* record. They are distinct instruments.

Samson. The \$3.75 were taxed by anticipation, on the ground that aid might be necessary in executing the writ of possession. It was thought that this should be placed at its highest, and a deduction made in the event of execution being executed in the ordinary way.

SAVAGE, Ch. J. We cannot anticipate resistance to the officer, so that aid will be necessary.

Rule accordingly.

UTICA,
Aug. 1824.

The People
v.
Honsenfratts.

THE PEOPLE *against* HONSENFRATTS.

Ejectment and judgment for costs against the plaintiff. Presenting the lessor of the plaintiff with the *ca. sa.* and serving him with the consent rule, and demanding the costs, is not enough to warrant an attachment, but the taxed bill should be served by shewing him the original and delivering a copy.

THE defendant was lessor of the plaintiff in ejectment, entered into the consent rule, and the verdict and judgment were against *James Jackson*, the nominal plaintiff. Hereupon the defendant's attorney issued a *ca. sa.* against *James Jackson*, for the costs, which was shewn to *Honsenfratts*, the lessor, who was shewn, at the same time, the original consent rule, and served with a copy thereof by one who had a written authority from the defendant's attorney to receive the costs. He demanded the costs of *Honsenfratts* upon these papers, and they not being paid, an attachment was issued, which being served and returned at this term,

Noxon, for the defendant, objected that the attachment had improvidently issued, inasmuch as no taxed bill of costs had been shewn and demanded, nor was any copy served.

S. Wood, for the plaintiffs, said, the *ca. sa.* is, in this case, conclusive evidence as to the amount. The English practice is, to demand the amount contained in the *ca. sa.* and, on non-payment, move for an attachment, as was done in this case. He cited *Runnington on Ejectment*, 416; and 2 *Sell.* 116, where this is laid down as the rule of the K. B. which governs this Court.

Curia. The defendant must be discharged. The plaintiffs have proceeded irregularly. The lessor of the plaintiff should also have been served with a taxed bill of the costs, by shewing him the original and delivering a copy, before moving for the attachment.

Rule accordingly.

UTICA,
Aug. 1824.

Smith.
v.
Judges of Putnam.

In the matter of LEMUEL SMITH against THE JUDGES of the Court of Common Pleas of the county of PUTNAM.

A CAUSE between *Fitzpatrick*, plaintiff, and *Smith*, defendant, had been commenced and carried to issue in the *Putnam* Common Pleas; and then the defendant removed it by *habeas corpus* into this Court, but putting in no bail, a *procedendo* issued and was filed in the Common Pleas, in *February* term last, and on the last day of that term the plaintiff's attorney moved to bring the cause on to trial. This was resisted by the defendant's counsel, on the ground that the cause had but the day before, as appeared by the *procedendo* on file, been brought into that Court; and, therefore, no notice of trial could regularly have been given. The Court decided that they would hear the cause, and it was tried accordingly, and a verdict found for the plaintiff, the counsel for the defendant declining to appear. At their next term, in *June* last, a motion was made to the Common Pleas to set aside the verdict, &c. as irregular, but they denied the motion.

A cause being removed by *habeas corpus* from the common pleas to this court, the former have no jurisdiction till a *procedendo* filed; and till this be done, any proceeding in the cause in the court below is irregular.

A motion was now made for a mandamus, requiring the Court of Common Pleas to vacate and set aside this verdict and the subsequent proceedings.

W. Nelson, for the motion.

J. Oppie, contra.

Curia. The Court had no jurisdiction of the cause, and could not proceed till after the *procedendo* filed. Of course, there could have been no regular notice of trial. The proceedings of the Court below were, for this reason, irregular, and the motion must be granted.

Rule for a mandamus.

UTICA,
Aug. 1824.

Rose
v.
Bates.

ROSE *against* BATES, Sheriff of ONTARIO.

A circuit judge may grant an order for a stay of proceedings till the further order of this court, upon a verdict, &c. though before a case settled.

A TRIAL being had and a verdict rendered for the defendant, in *June* last, at the *Ontario* Circuit, the plaintiff's attorney made and served a case for the purposes of a new trial, to which amendments had been proposed and notice of settling the case given; but, before settled, the Circuit Judge granted a general order, that "all proceedings on the part of the defendant in this cause, upon the verdict rendered in the same, be stayed until the further order of this Court;" and now,

J. C. Spencer, for the defendant, moved to set aside the order as irregular. He said the Judge had power to enlarge the time for making a case, proposing amendments, &c. but he cannot grant an indefinite order to stay proceedings "until the further order of the Court." It may deprive the party of an appeal to this Court, from an order on the case settled, where the opposite party has ample time to settle the case before the term.

W. Hubbell, contra.

Curia. We think the Judge had a right to grant this order. He understands the case; it is tried and finally settled before him; and he will not grant the order unless satisfied that, *when settled*, there will be probable cause for setting aside the verdict. We see no reason for requiring the party to wait till after the case settled, before he obtains this general order.

Motion denied.

OTICA,
Aug. 1824.

Gay
v.
Patterson.

GAY against PATTERSON.

THIS cause had been referred, and the report being in favour of the plaintiff, the taxing officer had allowed in the taxation of costs \$40, as a counsel fee for 5 days attendance of counsel before the referees.

The statute of April 5th, 1813, (sess. 36, ch. 58, s. 6) providing that, in case of reference, "a reasonable allowance shall be made to the prevailing party for such services and expenses as may accrue upon, or attend the reference of the cause," does not extend to the fees of counsel, &c. but is confined to the incidental expenses of the referees.

E. Williams, for the defendant, appealed from this taxation. He said he was aware that this charge had been allowed under the clause in the act of April 5, 1813, (1 R. L. 517, s. 4) which declares that, on taxation of costs upon a reference, "a reasonable allowance shall be made to the prevailing party, for such services and expenses as may accrue upon, or attend the reference of the cause." With deference, he considered the practice incorrect. The fee bill was passed April 9th, of the same year, (2 R. L. 3) fixing the allowance to attorneys, counsel, witnesses, &c. and if the former act contemplated an extra allowance, it was repealed by the latter. But the statute authorizing this *reasonable allowance*, may be satisfied, entirely independent of attorney and counsel fees. It means no more than that the allowance shall be made for those expenses not embraced by the fee bill, owing to the peculiar course of proceeding; such as the expenses of the referees, as house-room, board, &c. In all other respects the quantum should be graduated by the fee bill. If you give an extra allowance to counsel, there is nothing to prevent your enlarging the fees of the attorney, witnesses, the magistrate for swearing the referees, &c. This may certainly be done upon the same principle.

W. H. Maynard & G. C. Bronson, contra, relied upon the practice as settled, and mentioned a manuscript case decided several years ago, upon the authority of which this allowance had been repeatedly made.

Curia. This counsel fee has been allowed in practice; but, on examining the subject, we think the allowance was

UTICA,
Aug. 1824.

Cutler
v.
Colver.

erroneous. The words of the statute may be satisfied by taxing the incidental expenses of the referees ; and we think this is all the legislature intended. We direct a re-taxation accordingly.

Rule accordingly.

CUTLER against COLVER.

After a *fi. fa.* has been levied, the plaintiff cannot withdraw it, and issue a *ca. sa.*

JUDGMENT being against the defendant, who had not put in special bail, the plaintiff issued a *fi. fa.* returnable at the present term, with which the Sheriff called on the defendant, who said he had no personal property to satisfy it, but he had real estate, which he pointed out to the Sheriff. This real estate being heavily encumbered by previous judgments, &c. the plaintiff took back the *fi. fa.* and gave the Sheriff a *ca. sa.* which he executed. The defendant being in prison, a motion was now made for his discharge, and the only question was, whether taking back the *fi. fa.* and issuing a *ca. sa.* was, under the circumstances, regular.

Curia. Had there been no effort, on the part of the Sheriff, to execute this *fi. fa.* it would be, at least, questionable whether the plaintiff might not have withdrawn it and taken his *ca. sa.* But here was a virtual levy of the *fi. fa.* after which it could not be withdrawn. Its execution should have been completed. (a) The *ca. sa.* must be set aside, on the defendant's stipulating not to bring false imprisonment.

Rule accordingly.

(a) Vid. *Sloan v. Wattles*, 13 John. 158.

UTICA,
Aug. 1824.

Updegroff
v.
Judges of Ni-
agara.

In the matter of UPDEGROFF and others against THE JUDGES of the Court of Common Pleas of the county of NIAGARA.

DEBT, in the Court below, by *Potter*, assignee of a gaol bond, against *Updegroff* and two others, the obligors. The declaration set forth a *ca. sa.* in favour of *Potter* against *Updegroff*, the arrest of *Updegroff*, the execution of the bond, with the condition, which was, that *Updegroff* should remain a true and faithful prisoner, and should not, at any time, or in any wise, escape or go without the limits, &c. The declaration then averred an escape, whereby the bond became forfeited, &c. Plea, *nil debent*. Verdict, "that the defendants do owe, &c. and they assess the damages of the said plaintiff on occasion of the detention of the within debt, over and above, &c. to \$830.05." On this verdict, the plaintiff entered up judgment and took out execution for the whole damages. A motion was made in the Court below to set it aside, which was denied; and now,

In an action on a bond for the performance of covenants, and an assignment of breaches, the execution will not be set aside for a mere informality of the verdict in not assessing damages for the breach, but referring the damages to the detention of the debt.

J. C. Spencer, moved for a mandamus requiring them to grant the motion, on the ground that there was no assignment of breaches, nor writ of inquiry of damages; or, at any rate, if the declaration did assign breaches, the verdict did not assess damages upon the breaches. He cited *Van Benthuyssen v. De Witt & others*, (14 John. Rep. 213) *Caverley v. Nichols*, (*id.* 189) *Hardy v. Bern*, (5 T. R. 636) *Welch v. Ireland*, (6 East, 613) and 2 Saund. 187, n. 2.

J. Platt, contra, said that the objection to the proceedings below, if well founded, was mere matter of error, not irregularity, and could not be corrected summarily. We have a right to be heard in a more solemn form: the party should have brought his writ of error, upon which, if the decision of this Court should be against us, we might go to the Court of Errors. But the assignment of breaches was sufficient. The parties went to trial upon that assignment, and the ver-

UTICA,
May, 1824.

Shipherd
v.
White.

dict was rendered upon it. The cases cited are those where no assessment of damages was had.

Spencer, in reply. The verdict has no relation to the breach assigned. That was for the escape. The verdict is for the detention of the debt. It is the same, then, as if no assessment of damages had been made in the cause.

Curia. The assignment of breaches was sufficient ; but it is said the verdict does not pursue the assignment. The parties went to trial upon the breach assigned, and we cannot help seeing that the omission in the verdict to refer to the breach in assessing damages, must have arisen from a mere clerical mistake in the entry, which is amendable by the Court below. The case differs altogether from those cited. In those cases there was no attempt to assign breaches. Even on error brought, the least we could do would be to send this verdict back to be amended, or amend it ourselves.

Motion denied,

SHIPHERD and STORRS *against* WHITE.
CAMPBELL *against* SCHULT.

Exceptions to a judge's or court's opinion should be noted down upon the trial, or they cannot be used in a bill of exceptions.

On settling the bill, notice of time and place when and where this

is to be done, should be given to the defendant in error :

Otherwise the judge or court will not be compelled, by mandamus, to execute the bill.

And if executed, it will be set aside.

Whenever a bill of exceptions is signed, under circumstances wherein the supreme court would not compel its execution by mandamus, it will be set aside on motion.

sufficient, he drew and took the bill with him at the next term, and gave it to *White's* attorney for inspection, with a request that he would amend it, so that the draft and amendments might be submitted together. He requested time to look at his minutes, which he said he had not with him, promised to amend the bill the first opportunity, and retained it for that purpose. He was repeatedly solicited to propose amendments, which he omitted to do, and ruled the plaintiffs to assign errors while he had possession of the draft.

UTICA,
Aug. 1834.
Shipherd
v.
White.

In neither of the causes were the exceptions reduced to writing on the trial, and both bills were finally settled and signed by three of the Judges, after they had gone out of office, and without giving any notice of the time and place of their being so settled to the attorneys of *White* and *Schult* respectively. An issue of *in nullo est erratum* having been joined, and the causes noticed for argument at this term,

R. Weston, moved to strike them from the calendar, or that the bill of exceptions be set aside,

J. L. Wendell, contra.

Curia. If the plaintiffs were pressed for time to assign errors, they should have obtained a Judge's order to extend it, till the bills could have been fairly settled. The defendants in error should, at least, have had notice of the time and place when and where the bills would have been submitted to the Judges for their sanction. This should always be so; more especially at such a distance of time from the trial. We would not have compelled the Judges, by mandamus, to seal the bills, without such notice; and when bills of exception are signed under such circumstances as would not call for our interference by mandamus, we will, on application, set them aside, as improvidently executed. (a) This

(a) When the Court will compel the Judges to sign by mandamus, *vid. Sikes v. Ransom*, 6 John. Rep. 279. *Midberry v. Collins*, 9 John. 345. *Lanuse v. Barker*, 10 id. 312. *Pratt v. Malcom*, 13 id. 320.

UTICA,
Aug. 1824.

Jansen
v.
Tappen.

rule is applicable here upon another ground : In neither of these causes were the exceptions reduced to writing upon the trial, or during the term. (*Midberry v. Collins*, 9 *John*. 345.)

D. Russell, for the plaintiffs in error, submitted whether the Court would not refer the bills to the Judges of the Court below, for revision.

Curia. The plaintiffs in error were irregular in the outset. The exceptions should have been noted down upon the trial. Their remedy by bill of exceptions is gone.

Russell. Will not the Court allow the plaintiffs to discontinue without costs ? They have gone on in perfect good faith.

Curia. We see no reason for this. It was palpably irregular to proceed and settle the bills without the least notice of the time and place at which this was to have been done.

Motion granted.

JANSEN, administrator of JANSEN, against TAPPEN.

An affidavit
for a reference
should state
that issue is
joined.

E. WILLIAMS, for the defendant, moved for a reference in this cause.

E. Cowen, contra, objected that it did not appear from the affidavit on which the motion was founded, that issue had been joined in the cause ; and, for this reason,

Motion denied.

UTICA,
Aug. 1824.

In the matter of the application of **TIMOTHY HURD** against
MAGEE, Sheriff of **STEBEN**.

Hurd
v.
Magee.

On the 21st November, 1818, a judgment was docketed in this Court, in favour of *Reeve* against *Smith*, for \$192,09, on which execution issued, tested Oct. 9th of the same year, returnable at the ensuing January term, directed to the Sheriff of *Steben*; who, on the 19th of January, 1819, sold the farm on which *Smith* then resided, to *Hurd*, and executed a deed for the same to him. This was before the act which allows the redemption of lands sold upon execution had passed. On the 18th October, 1814, a judgment for \$103,88, was docketed in this Court, in favour of one *Peterson*, against the same *Smith*. On this judgment execution issued; by virtue whereof *Magee*, Sheriff of *Steben*, on the 30th Nov. 1822, sold the same farm to *Hurd*, for \$159,06, and gave a certificate of this sale, &c. April 6th, 1828, a judgment was docketed in this Court, in favour of *Henry Welles*, against *Smith*, for \$210: and on the 3d Oct. 1820, a judgment was docketed in this Court, in favour of *Baker* and another, defendants, at the suit of *Smith*, for \$33,55 costs. After the expiration of 15 months from the sale by *Magee*, *Hurd* demanded his deed of *Magee*, which he declined giving, having previously executed a deed to *Welles*, who had redeemed as creditor by judgment, and as assignee of the judgment in favour of *Baker*. On affidavits of these facts,

A judgment creditor has no right to redeem under the 3d section of the act of April 12th, 1820, (sess. 43, ch. 184) unless his judgment be a lien on the land which he seeks to redeem.

It cannot be a lien where the land of the debtor is sold and conveyed either by the debtor or by the sheriff, before the judgment of the creditor claiming to redeem is docketed.

And tho' it be insisted that the sale was fraudulent and void as to creditors, the court will not try this question on motion.

J. G. Spencer, moved for a mandamus requiring the Sheriff to execute a deed to *Hurd*.

J. A. Collier, contra, read an affidavit, stating that the judgment in favour of *Peterson* was in the *Steben* Common Pleas; and that on the sale in 1822, *Hurd* and one *Tuthill* became joint purchasers; that *Welles* redeemed after a year, and before 15 months from this sale; that *Smith* continued in possession of the farm in question till after *Welles'* judgment was obtained; and that there was a material variance

UTICA,
Aug. 1824.

Hurd
v.
Mages.

between the judgment and execution under which *Hurd* originally purchased.

He argued that though *Hurd* had a right to insist on his first purchase, he cannot do so at this stage of the proceeding. He should have confined himself solely to the right which he thus acquired. But he has waived his former right, and must now be confined to that which he acquired under the sale of 1822. After thus making his election, it is in the power of any judgment creditor to come in and redeem, if his judgment is of a date anterior to the expiration of 15 months after that sale. He submits to the elder and better title. This he had a right to do, and might have redeemed as between us and *Peterson*. He admits that he acquired no right upon his first purchase; and, indeed, this is true independent of his second, as it respects the creditors of *Smith*, who continued in possession of the farm long after the first, which was evidently fraudulent. We were right in disregarding it, and redeeming. *Hurd* had a right to redeem from us, as assignee or grantee of the land, but the time for this has gone by. The year—the 15 months have expired. Had he redeemed as grantee, the second sale would have been void. (*Sess. 43, ch. 184, s. 2.*) What right has he to lie by, and compel us to suffer his taking a title under the older judgment? Can *Hurd*, having waived his right to redeem, say, after the year and his rights are gone, “*I am grantee*, and yet have a right to a deed under the senior judgment, in virtue of my second purchase?” His remedy would have been complete without this. If evicted, either by a stranger or any other person, the statute, (*1 R. L. 504*) declares that the money which he has paid shall be refunded. He waives all right to that remedy, by his second purchase, because actual eviction is the sole foundation upon which it would rest. This Court have decided that the judgment is a *lien*, though obtained more than a year after the sale. Thus our right is complete, as it respects the second sale; and will the Court suffer *Hurd* to lie by till his right is gone as grantee, and then come forward in the character of a purchaser? Will such a course accord with the spirit of the act to which this Court have given a construction? “This

statute, says the Chief Justice, in *Van Rensselaer v. Sheriff of Albany*, (1 Cowen's Rep. 510) "is evidently remedial ; and, in its exposition, it is our duty to bear in mind the evil intended to be prevented, and the remedy proposed ; and so to construe the act as to suppress the evil and advance the remedy." Are we not within the intention of the legislature ? Will not the object of the statute, as avowed by all the Court, which is to keep up a perpetual auction, be in this manner the most effectually promoted ? Other judgment creditors ought not to stand peaceably by, and see *Hurd* invested with this additional title, which fortifies his first, and renders him secure in a purchase which was evidently fraudulent.

UTICA,
Aug. 1824.

Hurd
v.
Magee.

[SUTHERLAND, J. But it is necessary that you should shew your judgment to be a *lien* on this land. How can this be ; when the title of *Smith* was sold before the passage of the act, and a deed given which passed the title ?]

Collier. *Smith* was still suffered to continue in possession. Our judgment found him there ; and, at any rate, it attached upon his possessory interest, or whatever interest he had. He could not set up an outstanding title in *Hurd*, or any one else, to defeat an ejectment founded on a purchase under our judgment against him. It would be no more than fair to infer that he had acquired a title since the first sale. We cannot be conscious of what his right is, and, at any rate, should not be concluded by this summary application. We say *Hurd's* purchase was fraudulent, and that the sale was upon an irregular execution. The whole was void ; and the Court would not order an amendment so as to conclude us. They will rather incline to keep the right of redemption open to all the creditors. They should leave *Hurd* to his elder title. He has no right to his double character. It is enough that he claims under a fraudulent sale, or doubtful title. The Court should not deprive us of our right to contest it. I agree that the language of some of the Court, in *Dickenson v. Gilliland*, is against the idea of our having a *lien*. But the sale, in that case, to *Prindle*, was absolute and

UTICA,
Aug. 1824.
Hurd
v.
Magee.

honest. Here, we say, the sale was not only fraudulent, but it was subject to an elder judgment, under which a subsequent sale takes place. Besides, in that case, the grantee was in possession.

Spencer, in reply. *Welles* has no right to appear here at all; or, if otherwise, we have a prior right to redeem. The sale under the first judgment was absolute and binding upon *Smith*, as if he had executed the deed himself, subject, to be sure, like every other sale, to be defeated by a paramount title, either by judgment or otherwise. How can *Hurd's* acts be made to operate as a waiver of rights which he had acquired by deed? This is the first time, I believe, it was ever contended that a man forfeited his right to land by the purchase of a judgment, or bidding in under a judgment with the view to fortify and sustain his title. The course of *Welles* was plain. He should have attended the sale, and become a purchaser himself.

It is said that *Smith* was in possession, but this was no evidence of title. Admit that he could not controvert *Welles'* title in an action of ejectment: a recovery in that action is not conclusive evidence of title. It relates merely to the right of possession. It is not enough for *Welles* to say that he will contest the right acquired under *Reeve's* judgment, without shewing a single fact to impeach it; for I presume the variance between the judgment and execution is not seriously insisted on. A subsequent judgment creditor cannot object this. If any thing serious was intended on the head of fraud, why was not the proper remedy resorted to? Why was not a bill in Equity filed, in order to sift the fraud? The variance is plainly amendable. Fraud is the only ground of opposition at law or in Equity, and the right to relief, in either case, is gone, by our purchase.

It is said that a perpetual auction is to be kept up. Between whom? Those creditors, only, whose judgments are a lien upon the land. It has been twice decided, that where there is no lien there is no right to redeem. (*Erwin v. Schriever*, 19 John 379. *Dickenson v. Gilliland*, 1 Cowe's Rep. 481.) And a sale under *Hurd's* judgment, before the re-

demption act, divested *Smith's* title, so that there was nothing upon which *Welles'* or *Baker's* judgment could operate.

UTICA,
Aug. 1824.

Chichester

v.
Cande.

Curia. This motion must be granted. The Sheriff's sale and conveyance under *Reeve's* judgment divested the title of *Smith*, the judgment debtor. He then had no interest upon which the subsequent judgment, either of *Baker* or *Welles*, could become a *lien*. Having no *lien*, it is well settled by the authorities cited, that *Welles* had no right to redeem.

Then it is said, that the judgment of *Reeve*, and the purchase of *Hurd*, were fraudulent as to the other creditors of *Smith*; but the suggestion is almost entirely gratuitous. There is nothing in the affidavits shewing any thing like fraud; yet suppose a case of fraud made out, we could not try it in this summary form. *Welles* should have caused the proceedings to be stayed, or filed his bill in Equity, and prevented the second sale, till the question had been settled whether his judgment could be let in, on account of the fraud, or not.

The Sheriff must execute the deed to *Hurd*, as it is applied for; but we do not interfere with the conveyance to *Welles*. It can do no harm, if, as we hold, it passed nothing.

Motion granted.

CHICHESTER and VAN WYCK against CANDE, impleaded
with LASHER.

SEVEN judgments had been obtained in the *Onondaga* Common Pleas, against *Lasher* alone, to the amount of Judgment and execution by A against B, but by accident the record was not filed; then judgment and execution in favour of C against B. Both executions being levied on the same personal property, which was sold and the avails paid over, by order of this court, in certain portions, to A and C, before the latter discovered that A's judgment was imperfect. Then C, on discovering this, applies for a preference as to the whole of the money. This was denied, and on A's application he was allowed to file his record *nonne pro tempore*, it appearing that his execution was first levied, and C having full notice of A's judgment, before his (C's) judgment was obtained.

UTICA,
Aug. 1824

Chichester
v.
Cande.

\$2725,19, a *fi. fa.* on each of which was delivered to the Sheriff of Onondaga on the 24th September, 1821. The following judgments were obtained in this Court, viz. one in favour of Chichester & Van Wyck, for \$959,28, against Lasher & Cande, partners, on which a *fi. fa.* was delivered to the Sheriff of Onondaga, Sept. 27th, 1821—a judgment in favour of Tredwell *et al.* against Cande impleaded with Lasher, for \$784,09—and another judgment in favour of Humphrey against Cande impleaded with Lasher, for \$942.53. The two last judgments were also against the defendants as partners, and the *fi. fa.* in each was delivered to the Sheriff of Onondaga, Oct. 29th, 1821. On these executions the Sheriff levied on partnership property, and on his application to this Court for direction, in January term, 1822, he was ordered to sell the goods and bring the money into Court, which he did, to the amount of \$1764,50. At May term, 1822, this Court directed that the execution in favour of Chichester & Van Wyck be first satisfied, secondly the other two judgments in this Court, which had been assigned to Russ, and that the Common Pleas executions be postponed to these. The Sheriff accordingly paid to Chichester & Van Wyck \$986,34, and \$776,78 to Russ. Russ, on the last application to the Supreme Court, sought to obtain preference over C. & V. on the ground that their execution was returnable at the wrong place, had issued contrary to stipulation, and was sealed with an old seal, before used; but he failed in all these grounds. The *fi. fa.* was amended as to the place of return, and the stipulation and seal, being before used, were denied.

In November last, Russ discovered, for the first time, that no record of any judgment in favour of C. & V. had ever been filed. Application was accordingly made by Russ, at the last February term, to vacate the former proceedings, set aside the execution of C. & V. as having issued without any judgment to support it, and that the moneys paid to them be paid over to Russ, on his judgments. On account of a mistake in the title of the papers, the motion was then denied, but renewed again at the last May term, whence it

was postponed to the present term, for the purpose of producing additional affidavits.

The attorney of *C. & V.* swore, that he had enclosed a record in their cause, duly signed, with the warrant of attorney to confess judgment, and directed them, by mail, to the Clerk's office of this Court, at *Utica*, in season for their arrival, in the ordinary course of the mail, so as to warrant the *f. fa.* which he issued; and he supposed that they had been regularly filed till *January*, 1823. when they were returned to him from the General Post Office, as a dead letter; which fact he concealed till the present motion was noticed.

A motion was also made and continued as above, on the part of *C. & V.*, to amend, by filing the warrant of attorney and record *nunc pro tunc*.

S. L. Edwards & H. Bleecker, in support of the motion to vacate the former proceedings, and set aside the execution of *Chichester & Van Wyck, &c.* and against the motion to amend.

The money was ordered to *C. & V.* on the ground that they were judgment creditors. It turns out, in fact, that there was no such ground. The whole was a mere fabrication; and, we believe, the Court have never gone so far as to give the party a judgment *nunc pro tunc*, where he never had one, and not a paper ever reached the proper office. *Russ*, the assignee of the other judgment, would have received the money, if the truth had been known. Saying the least, the whole proceeding was founded in mistake. *Russ* was always legally entitled to this money, and shall *C. & V.* profit by the concealment? An execution issued before the judgment record is filed, is a nullity. (*Barrie v. Dana*, 20 *John*. 307. *Vin. Ab. Judgment*, A. 1, K. a.) There can be no doubt that the Court has power to order what we ask under these circumstances. They may order the money refunded, as if the judgment had been reversed by them on error. (2 *Salk*. 587, 588.)

A. Spencer, contra. It is said here was no judgment. That we deny. True there was no judgment docketed, but the record was signed upon a regular bond and warrant of

UTICA,
Aug. 1824.
Chichester
v.
Cande.

UTICA,
Aug. 1824.

Chichester
v.
Gande,

attorney. Filing and docketing does not give the record its validity. This is derived from the act of signing. Full notice of this judgment is not denied on the part of *Russ*. I do not question the physical power of the Court to vacate all these proceedings, but I do deny that it would be a discreet exercise of power, and there is little doubt of the Court's power to amend. The cases I cite to this point are, *Jackson v. Hammond*, (1 *Caines' Rep.* 496) *Seaman v. Drake*, (*id.* 9) *People v. Burdock*, (3 *id.* 104) *White v. Lovejoy*, (3 *John. Rep.* 448) *Close v. Gillespy*, (*id.* 526.) The language of the Court in *Barrie v. Dana*, to be sure, is pretty strong in relation to that case; but it should be confined to the case, which was a *ca. sa.* issued before the record filed, on which the defendant had been imprisoned. There is a difference, in this respect, between execution against the body, and the mere goods and chattels. Courts will go very far in amending proceedings which are defective through mistake. In *Hart v. Reynolds*, (not reported) the defendant's real name, in the bond and warrant of attorney, was *John Reynolds*, but all the proceedings, from the *cognovit* to the docket, inclusive, were in the name of *Elisha Reynolds*. There was, then, no judgment against *John Reynolds* upon the docket, or even in the record, yet a subsequent judgment obtained by *Doe* was denied a preference, on the ground that when he obtained his judgment he had notice of *Hart's*, as a judgment against the real defendant; and *Hart's* judgment was amended throughout, saving the rights of purchasers who had not notice. This, too, was a proceeding in relation to real estate. (a)

(a) R. P. HART against JOHN REYNOLDS—August term, 1817.

IN this cause the facts were briefly that *John Reynolds*, of *Moreau* in *Saratoga* county, had executed to *Richard P. Hart* a bond and warrant of attorney to confess judgment for \$10,000, but, by mistake, all the proceedings, including the docket of the judgment, were in the name of *Elisha Reynolds*, defendant. The papers were filed, and the judgment docketed, *June 6th*, 1811. Afterwards two judgments were obtained in this Court, and regularly docketed—one in favour of *Walter Doe*, and another in favour of *James Taylor*—previous to which last judgment, and before *Doe's* execution issued, all the personal property of *Reynolds* had been sold up.

Bleecker. in reply. None of the cases cited, obviate the objection against an amendment here. The rights of a creditor are in question, who had a regular judgment. None of the cases cited present the question as to creditors, except

UTICA,
Aug. 1824.
Chichester
v.
Cande.

on a *f. fa.* in favour of *Hart*, leaving a considerable balance yet due, which was claimed by *Hart* to be a *lien* on *Reynolds'* real estate. *Doe* and *Taylor* had actual notice of *Hart's* judgment, and supposed it had been regularly docketed, till after their judgments were perfected. On discovering *Hart's* mistake, they moved to set aside his execution, which was opposed, and a cross motion made to amend, upon the papers introduced for and against the first motion. *J. Reynolds* gave a written consent to the amendment.

The motion was argued by *J. Tallmadge*, for *Doe & Taylor*, and *L. Mitchell* for *Hart*.

Tallmadge reasoned, with great ingenuity, against the Court's going the length of creating a judgment in the name of amending it.

Mitchell answered, and his researches extended to the whole law of amendment in relation to this subject. As the result of his argument was adopted by the Court, I think it will be found highly useful and acceptable to the profession.

1. He objected to the motion for setting aside the execution, because made by persons having no right to make it. The personal property of *Reynolds* was exhausted by *Hart's* execution, before it could be affected either by *Doe's* or *Taylor's*; and, as to the realty, there is no necessity for setting aside the first execution to secure *Taylor* and *Doe*; for they contend that they have the oldest judgments. If so, they are safe, whether we sell or not. Ejectment is their remedy, and not this motion.

The motion, then, must be rejected, as being officiously made by strangers, without *Reynolds'* consent, and against his wishes.

2. The defects in our judgment, &c. are amendable, and this we may avail ourselves of, on this motion, as it was held in *Seaman v. Drake*, (1 *Cases' Rep.* 9) where a motion was made by bail to set aside proceedings, and denied, because the defect was amendable. We move to amend the judgment and proceedings, and that the judgment be docketed against *John Reynolds*, *nunc pro tunc*, absolutely as to *Taylor* and *Doe*, who make the present motion, and that the docket shall contain a saving of the right of prior purchasers. If the Court think it necessary, we wish that they should reserve the power of modifying the rule as to the other judgment creditor, on their shewing that a particular injury will result to them within (say) three months, as they did in the case of *Wardell v. Eden*, (2 *John. Cas.* 128) the rule to be otherwise made absolute as to them. No such qualification is necessary or proper, if it be true that none but purchasers can avail themselves of the docket. At all events, *Taylor's* and *Doe's* judgments should be postponed without any reservation.

UTICA,
Aug. 1824.

Chichester
v.
Cande,

that of *Hart v. Reynolds*, and there the rights of creditors were saved. The question between these parties depends on their respective diligence. There is no natural equity in the case. There is no difference between the case of real and personal estate, which can affect this question. The

This motion for amendment is made by *Hart*, with the cognizance and consent of *Reynolds*; and the first question which presents, relates to the extent of the power of the Court on applications for amendments.

Where an appeal is made to the equitable side of the Court, the statutes of *Amendments* and *Jenfalls* are thrown out of view, although they control in all cases of amendment after writ of error brought. On such applications as the present, the broad rule has been adopted by the Court of B. R. that the Court will amend whenever the ends of justice require it. In *Mara v. Quin*, (6 T. R. 8) Lord *Kenyon*, Ch. J. says, "The forms of the Court are always best used when they are made subservient to the justice of the case;" and *Ashurst, J.* observes, "It is admitted that amendments have been made, at all times, in order to forward the justice of the case." In that case the Court put the judgment, *forti manu*, two years back, to prevent injustice, because it could not injure third persons. In *The King v. The Mayor of Grampond*. (7 T. R. 639) *Ld. Kenyon* says, "I wish that that could be attained, that *Ld. Hardwicke*, in the case before him, lamented could not be done, namely, that these amendments were reduced to some certain rules; but there being no such rule, each particular case must be left to the sound judgment of the Court. And the best principle seems to be that on which Lord *Hardwicke* relied, in the same case, that an amendment shall or shall not be permitted to be made, as it will best tend to the furtherance of justice. Amendments of this kind are not made under the statutes of jeofails, but under the general authority of the Court." In *Seaman v. Drake*, (1 *Caines' Rep.* 9) the Court allowed the judgment to be signed *nunc pro tunc*, because they said the omission was a neglect of one of their officers, which ought not to prejudice any one. It is to be observed, that by 1 R. L. 501, s. 2, it is enacted, that no judgment shall affect land, &c. as to purchasers, &c. but from the actual filing of the roll, after the same shall have been signed. Of course, by this statute, subsequent purchasers had acquired a priority of lien; yet the Court destroyed that priority by an amendment, *nunc pro tunc*, without calling even purchasers before them. And the reason was, that they had notice, and supposed there was a valid judgment, to which they expected their lien would be postponed. The amendment could not, therefore, disappoint them, nor work injustice; but the second incumbrance might well be supposed to have been taken, subject to such amendments in the prior record, as the Court should think fit and proper to direct. In *Close v. Gillerpie*, (3 *John. Rep.* 526) the attorney's name was allowed to be signed to the plea, *nunc pro tunc*, and per *Spencer, J.* "I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney, or by mis-

judgment is a *lien* on the realty, and the execution on the personality ; but neither can operate if they are void. No execution can issue without a judgment, and the decision in *Barrie v. Dana* would have been the same in relation to a *fi. fa.* as it was in relation to the *ca. sa.* The latter may or

UTICA,
Aug. 1824.
Chichester
v.
Candee.

take of the Clerk. Both are equally officers of the Court. In the present case, the judgment having been docketed, *Mancius* had, in legal intendment, notice of it. Had error been brought, there might have been more doubt. I cannot perceive that *Mancius*, (the judgment creditor has any right to avail himself of the irregularity which has intervened ; nor can I perceive that our right to amend, in case of mistake of one of our officers, is to be controlled by the effect which may be produced in another case. All amendments affect more or less *third persons*." This opinion adopts, in their fullest extent, the liberal and humane principles, towards officers of the Court, which prevail in the Court of B. R. and is full to the point, that a judgment creditor, *with notice*, shall not control the power of the Court to amend in cases of *mistake of its officers*, whether clerks or attorneys. The judgment, in that case, was as radically defective and irregular, till amended, as is the judgment in the principal case ; and the Court, by the amendment, created a preference which before did not exist. These cases furnish a conclusive answer to the objection, that the subsequent creditors' supposing there was a valid and legal judgment did not make it so ; and they could not know of the existence of a valid judgment, when none such, in fact, did exist. In neither of the two last cases was the judgment a valid one.

But the truth is, the *notice* destroyed the equity of the subsequent incumbrancers, and with it the right of objection to an amendment. In *Seaman v. Drake*, there was no judgment as to the real estate, so far as purchasers were concerned, until the amendment was made. In the case of *Close v. Gillespie*, there was no regular or valid judgment, until the plea was signed, because a void judgment is as *none* ; but the Court, in the former case, created a *lien* ; in other words, a *judgment as to the realty*, by relation, because the furtherance of justice made it necessary. In the latter case, a proceeding was validated, which before was nugatory, upon the same principle of equity. In the case of *Mara v. Quinn*, the Court, by a most extraordinary exertion of its equitable powers, with *strong hand*, allowed the judgment to be signed, filed and docketed, as of a day two years before it was, in fact, obtained, because it advanced the purposes of justice, and the want of notice could not injure third persons. Here we propose that the rights of third persons, purchasers without notice, be expressly saved. In *Mackay v. Rhineland*, (1 *John Cas.* 410) a judgment was entered *nunc pro tunc*, several months before it was, in fact, signed, or filed, or rendered.

One objection is, that *there is nothing to amend by*. To this we answer, it is *impossible*. It could be proper only on a writ of error—not where an appeal is made to the general authority of the Court, with consent of the

UTICA,
Aug. 1824.

Chichester

v.
Cande.

may not affect the party more severely than a *fi. fa.* and is the judgment of the Court to be controlled by such a consideration? The gentleman opposed to me, (then Ch. Justice) lays down the rule generally and unqualifiedly in *Barrie v. Dana*, that the record must be filed before execution can go,

defendant. Nothing can prevent the success of such an application, except the immoral tendency of the amendment, the only inquiry being, whether the amendment would contribute to the advancement of justice. On this principle the Court proceeded, in *Mara v. Quin*, in placing the judgment two years earlier on the docket than it was recovered. Yet, I ask, what was there in that case to amend by?

But there is something to amend by, viz. the *warrant of attorney*—the foundation of all the proceedings. This, according to 1 R. L. 4:6, must be filed with the record; and was, in this case, attached to the proceedings. It, therefore, identified the defendant, and a judgment may as well be rendered against *John*, by the name of *Elsha*, as he might be arrested by that name, or execute a bond by that name. A mistake of the name in the judgment may be corrected, provided the real defendant be ascertained in the previous part of the roll, even without the defendant's consent. (*Cro. Car.* 594. *Bac. Ab. tit. Amendment, (F).*) The warrant is a part of one entire security, the nature of which is ascertained by the warrant. Thus, the consideration of a judgment, entered by virtue of a warrant, is the subject of inquiry, on which the Court may award a feigned issue; but not on a judgment in a contested suit. This judgment by confession is *sui generis*, the nature of which is ascertained by the warrant. It is a judgment by *contract*, as contra-distinguished from a judgment by *operation of law*, and will be amended to fulfil the intent of the parties, *ut res magis valeat quam persat*. *Puleston v. Warburton*, (1 Salk. 43) was, "Ejectment. Verdict, *pro quer.* wherein he had counted of a demise, the 10th April, 1697, instead of 1696, for 97 was not come at the time of the trial; and the Court agreed, that in a judgment by confession on warrant of attorney, it had and might be amended in ejectment, because without such amendment, the agreement and intent of the parties could not be fulfilled, but denied it in the principal case, because it altered the issue, and made another title." In this case from *Salkield* there was nothing by which to amend the declaration, and the judgment roll, and the *consideratum est*, except the warrant; yet the Court say all might be amended; for the judgment being for the *said term*, refers to the declaration, and thus, by altering *one*, the *other* would necessarily be altered. That amendment, too, would have been made against the will of the defendant. But, in the principal case, *Hurt* has the *consent* of *Reynolds* to every amendment. Of course, every amendment must be made down to the entry of the judgment. The case from *Salkield* shews that the declaration may be amended. No third person has a right to object, till we arrive at the *consideratum est*, &c. and if the previous proceedings be considered as amended, the objection that there is nothing to amend by falls to the ground.

and declares that such has been the practice for 30 years. There is no difference between the different kinds of execution, either in law or common sense.

Suppose a *cap. ad. resp.* sent to a Sheriff, who never receives it, or a letter directing a rule for judgment, to be en-

UTICA,
Aug. 1824.

Chichester
v.
Caude.

The question, then, arises, whether if the other proceedings be right, the *consideratum est. &c.* may be altered, so as to become conformable to the previous proceedings, and this question is answered in the affirmative, by numberless authorities. In *Pelham v. Henn-ug*, (Cro. Car. 594) the marginal note is thus: "If the name of a party be right in the record, but wrong in the judgment, the judgment may be amended by the record. 'Tis a misprision of the Clerk." In affirmance of the judgment, the judgment itself may be set right, and amended by another part of the record, in a fact which appears to be the misprision of the Clerk, as in the mistake of names of parties. (Vid. *Bac. Abr. Amendment*, (F), which cites, 1 Roll. Ab. 357, and gives, as an example, "*Prædictus A*," instead of "*B*," and "*Charles*" instead of "*Robert*." There is a strong analogy between a security created by *common recovery*, and one given by warrant of attorney. Both are a kind of judicial lien; and there are many instances of amendments in the names of the parties in these common recoveries, as well as in fines. Recovery, entered by *A, B, and C*, but the name of *W* totally omitted, ordered by the Court to be amended. For example; warrant by *W. R. and Hester*—recovery, *W. R. and Margaret*, his wife, amended. (*Vin. Abr. Amendment*, (L).) On an application for such an amendment, it was objected that the heirs at law would be prejudiced, if the *fine* was amended. The Court said they could not take notice, whether it would be a prejudice to the heirs at law or not; but it was the duty of the Court to make the *fine* agreeable to the deed and intention of the parties. (*id.*)

It will again be objected, that the docket cannot, by law, be amended, for that might be injurious to purchasers and judgment creditors. We answer, the Court have the same power over the docket as over other proceedings, that of making it subserve the ends of justice. The rights of purchasers we wish to have saved, either by a *conditional docket*, expressly reserving the rights of prior purchasers and mortgagees, or by enjoining it on *Hart* to release them.

We shall here be told that *judgment creditors* are entitled to the benefit of the statute relative to docketing judgments. The statute, (1 R. L. 501) enacts, that no judgment not docketed and entered in the books, &c. shall affect any lands or tenements, as to *purchasers or mortgagees*, or have preference against *heirs. executors, or administrators*. *Expressio unius exclusio alterius*: by making the docket necessary as to *purchasers and mortgagees*, it is made so *only* as to them. This consideration is the more forcible, when it is recollected that, in the first section of the same act, the legislature have enacted, that no judgment shall continue, for more than

UTICA,
Aug. 1824.
Chichester
v.
Cande.

tered, which miscarries, and a thousand other cases arising in our complex system of practice, by which another obtains preference : will the Court relieve against such mistakes ? Will they take away a preference, because accident was against the party who moved first ? Is it enough that a judgment is planned without being perfected ? Where is the

ten years, a *lien* as against *bona fide* purchasers, or subsequent incumbrancers, y mortgage, judgment, or otherwise.

The question, then, again recurs, is a judgment creditor a *purchaser*, within the meaning of this statute ? A *purchaser* is one who acquires title otherwise than by descent ; (2 *Bl. Com.* 241) but a judgment creditor has no title to the defendant's real estate. For aught that appears, he may go against the *person* or personal property. Indeed, it has been settled in this state, that a judgment gives no title *per se*. Of course, the judgment creditor can never insist on the docketing clause of the statute. The Court, in considering him as a purchaser, would usurp legislative power. They would assume *jus dare—non jus exponere*.

It will be said, that he may sell the defendant's real estate, and if his judgment be the oldest one docketed, may apply the avails to satisfy it, and vest the title in the purchaser. I answer, in that case the statute would apply, but until a sale no purchaser can intervene ; and, of course, the statute, by the terms of it, can have no application.

The question, then, arises, whether this *possibility* of availing himself of this clause of the statute, is not sufficient to constitute him a purchaser ? and this question is emphatically answered in the negative, by the decision in *Jackson v. Dubois*. (4 *John. Rep.* 216.) It was there decided that a mortgage not registered, has a preference over a subsequent judgment docketed. The clause in 1 *R. L.* 373, respecting mortgages, coincides with that on the subject of docketing judgments. It is this : " No mortgage, nor any deed, conveyance or writing, in the nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide purchaser* of any lands, tenements, or hereditaments, unless the same shall have been duly registered as aforesaid." The language in the two statutes is so nearly the same, that the decision last cited may be considered in point to shew, that until a sale under the judgment first docketed, the prior docketing creates no preference, and the statute has no application. His honour Judge *Spencer*, in delivering the opinion of the Court, says—" Before this statute, there was no necessity of registering mortgages. They would have stood upon the same footing as any other lien on real property. Since the statute, they must be registered, or lose their priority as to junior mortgages, and be liable to be defeated, in case of a *bona fide purchase* prior to the registry. There is nothing in the statute which gives a preference to a judgment docketed, over an unregistered mortgage. Should the mortgagee permit a sale to take place prior to the registry, then, in my opinion, the ven-

discretion of this Court, arising upon questions of diligence, to end? We have gained a legal preference, and are entitled to retain it.

UTICA,
Aug. 1824.
Chichester
v.
Cando.

WOODWORTH, J. delivered the opinion of the Court. He went much at large into the facts of the case, which were

due of the Sheriff would be protected from the mortgage, and it would lose its priority.

After this decision, it may be said, with the utmost confidence, that the present case stands on the same footing as it would before the statute relative to docketts; and there cannot be a doubt that, before the statute, this judgment of *Hart* would have been an lien on *John Reynolds'* estate; and the Court, to give effect to the intent and agreement of the parties, would have ordered an amendment, precisely as a Court of Equity would have ordered a mistake in a mortgage to be corrected, as against a mortgagor, and all persons who bought with notice of the defective mortgage.

Here it appeared from the records of the Court, so that the fact could not be misunderstood, that by the agreement of *John Reynolds*, *Hart's* debt was to be secured by a judgment against his real estate, and such judgment was actually given, though informally. To say that the judgment is not against *John*, is puerile sophistry. It is a judgment against him, though not by his right name. This objection would, on the principle of our opponents, always prevent an alteration in the name of a party, in a conveyance, or fine, or a recovery, or a judgment. But the books teem with amendments in every one of these cases. Of the records of the Court all persons were bound, before the statute, to take notice, even executors and administrators, to determine the priority of debts. (6 T. R. 1.) So it is said, in *Tidd*, 360, that, before the statute, the defendant's lands were held from the time of the judgment, but since, the docketing is necessary as to purchasers and mortgagees. If this Court can direct the signing of a judgment *nunc pro tunc*, so as to perfect the oldest judgment, though radically defective, they certainly may supply any other deficiency; for a judgment not signed is, as to the real estate, a nullity so far forth as purchasers are concerned. To supply the signing *nunc pro tunc*, makes the judgment, as to all, different from what it was before signing. Thus, if the christian name of either party were altered, it renders that operative which before was void. As to the lien upon real property, the Court create a new judgment, as much in one case as in the other.

The truth is, that every alteration makes the judgment a new one; i. e. it makes it different from what it was before the alteration; and the futile argument, that "if the party knew of *Hart's* judgment, yet that the *scien-*ter did not make it a valid one, and that he must be supposed to have known it to be defective," would prevent every amendment. It might have been urged, with the same force, in the case of *Seaman v. Drake*, where the judgment was not signed, as in this case. If the judgment had been perfect, no amendment would have been necessary. Every application for

UTICA.
 Aug. 1824.
 ~~~~~  
 Chichester  
 v.  
 Cande.

scattered through a great variety of papers, and gave the opinion of the Court on several minor points, which I have not deemed it material to notice. He then spoke to the principal points nearly as follows :

We have considered this case as deliberately and fully as we think its importance and novelty require ; and we are

an amendment supposes the judgment to be defective. The distinction between a judgment creditor and a purchaser, is not only founded on the *language* of the statute, but in *good sense* ; for the lien of a purchaser is specifick. The money is advanced upon the *title* and *credit* of the estate, but that of a judgment creditor is *general*. He may go against the *person*. So in *Tidd*, 851, "If one article to buy an estate, and pay the purchase money, and afterwards a judgment is recovered against the vendor by a third person, who had *no notice*, yet this judgment shall not, in Equity, affect the estate. But a mortgagee, &c. shall hold place against the covenantee ; for, in this case, the money is lent upon the *title* and *credit* of the estate, and attaches upon the land ; but a judgment is only a *general security*—not a specific lien upon the land." So, in 2 *Fesey*, 662, per Ld. Chancellor, "A prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage, but a prior judgment creditor, getting a subsequent mortgage, cannot do it, because the judgment is not a specific lien upon the land ; that is, he does not go on the security—he has not trusted to the credit of the estate."

It is again to be observed, in this case, that the creditors had *notice* of *Hart's* judgment, when they took their own. The object of a docket is to give notice to purchasers, as much as it is the object of *registering* a mortgage. There is not the least shade of distinction. *Actual* notice, then, supersedes the necessity of a docket, certainly as respects judgment creditors, who are not named in the docketing statute, and it is sufficient, in case of a mortgagee, that he had notice at the time of taking his mortgage. By the notice the object of the act is answered, and taking the deed or lien, under such circumstances, is a *fraud*. This doctrine is fully canvassed in *Jackson v. Burgott*, (10 *John*. 461) where the late Ch. J. *Kent* says, "It may be assumed, as a settled principle in the English law, that where a subsequent purchaser, whose deed is registered, had *notice*, at the time of his purchase, of a prior unregistered deed, the prior deed shall have preference. The purchase, under such circumstances, is a fraud. It is considered as done *mala fide*, by assisting the original vendor to defraud the prior vendee ; and the Courts will not suffer a statute, made to prevent fraud, to be a protection to fraud. The foundation of the English doctrine is, the fraud of the 2d purchase, under a *knowledge* of the first. An unregistered deed is in no case *void*. It is always good as against the grantor and his heirs." He continues, "When the statute says that every deed not recorded shall be adjudged fraudulent and void, against a subsequent pur-

satisfied that the respective applications of these parties are addressed to the sound discretion of the Court. We do not forget that we are bound by decisions, as far as they can be made to apply to such a case ; but we do not find ourselves tied down by these to any particular course of proceeding. The whole tenor and scope of the cases appear to call for a

UTICA,  
Aug. 1824.  
Chichester  
v.  
Cande.

chaser for valuable consideration, whose deed shall be recorded, it undoubtedly meant a subsequent purchaser in *good faith*. A subsequent purchaser *mala fide* was not within the purview of the act. Consequently, in the case of a second purchaser, *with notice*, no estate passes to him by the deed." The whole of this opinion is worthy of particular attention, and, "*mutatis mutandis*," applies with peculiar force to a subsequent judgment creditor with *notice* of a former *lien*.

The moment such a creditor attempts to wrest from the older incumbrancer his security, he himself becomes an incumbrancer *mala fide*. In such case, no *lien* passes to him by the 2d judgment. It is urged by the opposite counsel, that when the credit was given, the subsequent judgment creditors had received no notice ; and, therefore, they are purchasers within the docketing statute. This notion is too absurd to require refutation. The credit was not given on the defendant's land. The creditors do not pretend to have examined the records before credit given, "*qui tacet consentire videtur*." *Taylor* admitted that he did not examine them. It appears from *Reynolds'* affidavit that he told both *Taylor* and *Doc*, at the time of executing their bonds and warrants, of the existence of *Hart's* judgment. *Taylor* admitted to *Mitchell* that he knew of *Hart's* judgment and execution when he took his own. *Doc*, in his affidavit, admits that he knew of *Hart's* judgment when *Hart's* execution issued, viz. the 28th of July, whereas the judgment in favour of *Doc* was filed the 5th of August, and *Doc* stated that he knew of no irregularity in *Hart's* judgment until September. Suppose *A* takes a mortgage, but does not have it registered, and *B* lends money on a note of the mortgagor, without notice of the mortgage, and afterwards, after *A's* mortgage is registered, *B* takes another mortgage, it would be ludicrous for him to claim priority, as a purchaser, because when he advanced the money on a note he knew not of *A's* mortgage. Suppose in the case now before the Court, on an application for an amendment, there appeared to be no judgment creditors, nor any one to oppose, except a grocer, who had credited *Reynolds* a few shillings ; and suppose he should allege, that he would not have trusted him if he had known of *Hart's* judgment : would such opposition avail any thing ? or could he be considered, in any sense, as a purchaser ? It is sufficient, in the case of a deed or mortgage, that the subsequent grantee or mortgagee had notice when he took his deed or mortgage. By taking it he does an act against conscience ; i. e. if it is ever applied to destroy an older *lien*. (9 John. 168.)

UTICA,  
Aug. 1824.

Chichester  
v.  
Cande.

very extensive exercise of discretion in the amendment of proceedings conducted in good faith, by filling the chasms which may have intervened through accident or mistake; especially in a case where the person whose rights are to be affected has had full information that the proceedings are perfect, and has gone on under the idea that they were so.

The present is an appeal to the *equitable powers of the Court*. Of course they ought to give *such relief as a Court of Equity* would give in this or similar cases. Suppose *A* contracts to sell to *B*, and he afterwards sells to *C*. *B* files a bill to compel specific performance, charging *C* with collusion—*C* must, in his answer, not only make out that he is a fair *bona fide* purchaser, for a valuable consideration, but also that this was without notice of *B*'s interest. Here *Hart* applies for the specific lien intended, and agreed to be given. No one can prevent the equitable interference of the Court but a purchaser, and that without notice. *Doe* and *Taylor* are neither of them purchasers, and they both had notice.

Again: a *defective security* will be enforced in Equity, against creditors who have only a *general*—not a *specific* lien; as *judgment* creditors. In *Taylor v. Wheeler*, (2 Sa k. 449) a copy holder in fee surrendered to the use of the mortgagee in fee, and became bankrupt before presentment, and there never was any presentment made, and the question was, whether the assignees of the commissioners of bankruptcy, or the mortgagee, should be preferred; and per *Ld. Chancellor*, "Though the surrender was void in law, for want of a *presentment*, and that might be the *laches* of the mortgagee, in not procuring it, yet the surrender was a *lien*, and bound the land in equity, and the assignee ought not to be in a better case than the bankrupt, who was plainly bound, in equity, by this defective conveyance. It was amended, as appears by 2 *Vernon*, 564, S. C. On the same principle, there cannot be a doubt but a Court of Equity would order this judgment docketed *nunc pro tunc*, as against all but *bona fide* purchasers. The opposition of a judgment creditor could not prevent it. More especially, when it appeared that he took his incumbrance with notice of the defective one, a Court of Chancery would refuse to listen to his objection for a moment. If Chancery would give the relief sought, will this Court drive us to the enormous expense of applying to that Court for relief, which this Court has equal power to give? It appears from the cases cited, (6 *T. R.* 8, and 7 *T. R.* 699) that this Court can do whatever the ends of justice require in regard to amending their records

That the 2d judgment creditor knew of the older judgment at the time of obtaining his own—that he has equal equity with the first, while attempting to defeat the prior one, and wrest from the oldest creditor his security, is a doctrine which would be scouted from a Court of Equity.

As to the case of *Sale v. Crompton*, (1 *Wils.* 61) and *Wentworth v. Stafford*, (*Ld. Raym.* 68) cited on the other side, against an amendment, they both proceed on the ground that an amendment would be injurious to

We feel less delicacy in going for this purpose to the utmost limit of our power, when it is plain that no one can suffer from its exercise. The amendment of proceedings must, in a great measure, rest upon this consideration.

Here is not a struggle in relation to the avails of a freehold estate, the disposition of which might be controlled by

UTICA,  
Aug. 1824.  
Chichester  
v.  
Cande.

purchasers. The judgments, in both cases, were old ones; the purchasers could not be ascertained; nor was any offer made to release them, or have their rights saved. In the case now before the Court, *Reynolds* swears there are but three purchasers, and those *Hart* offers to release, or to have their rights and those of all other possible purchasers, saved by a conditional docket. In *Bacon's Abr. Amendment*, (F) also cited on the other side, it is conceded, that if the rights of purchasers did not come in question, the judgment might be amended to any extent.

Neither can it be said that a judgment not docketed is not a lien; for the case of *Seaman v. Drake* shews the incorrectness of such a position. In that case the judgment was not signed, and, therefore, had no lien as to purchasers; yet the Court allowed it to be amended, as well as to purchasers as judgment creditors. The truth is, a judgment not docketed is a lien. It was so at common law, and in *Seaman v. Drake* the Court created a lien where none before existed. In the case cited from 2 *Vernon*, 564, Chancery made good a totally void surrender, stating that though void, yet it was a lien as between the parties, and the assignees were only general creditors, and had not a specific lien, as mortgagees have. So, in this case, our judgment was a lien; Equity would compel the defendant to comply with his agreement, and the resistance of those creditors who knew of *Hart's* judgment is *unconscientious, dishonest and fraudulent*. In asking that the judgment be amended, as to *Taylor and Doe*, we request nothing unreasonable or improper. As to the other judgment creditors, not now before the Court, we are not very anxious that the Court should interfere.

The Court directed the following RULE:—

August 22d, 1817.

(After the title of the cause.)

A motion having been made on behalf of *Walter Doe* and *James Taylor*, judgment creditors of *John Reynolds*, to set aside the execution issued to the Sheriff of *Saratoga* county, in the above cause, on the grounds specified in the notice of said motion, and a cross-motion having been made by *Richard P. Hart*, to amend the record of judgment and proceedings connected with such record, filed the 6th day of *June*, one thousand eight hundred and eleven, in favour of *Richard P. Hart* against *Elisha Reynolds*, entered and filed by virtue of a warrant of attorney attached to said record, executed by *John Reynolds*, and also the docket of said judgment and the entry of the time of signing said record *nunc pro tunc*, on the grounds

UTICA,  
Aug. 1824.

Chichester  
v.  
Cande.

the priority of the *judgments*, which are in themselves liens upon that kind of property ; but it relates to the personalty, which is bound by an execution alone. A knowledge that there was or was not a judgment in existence, could in no way be material to *Russ*, or the creditor who assigned to him, for the reason that a judgment, *per se*, could not affect their rights. The important facts in relation to this case were perfectly understood by all the parties in interest, as early as *May* term, 1822, when the subject was before this Court upon a disclosure of those facts. The money now in question was

set forth in the affidavits on which said cross-motion is founded : On reading and filing the affidavits read in this cause, ORDERED, on motion of Mr. Mitchell, counsel for *Richard P. Hart*, that the motion to set aside said execution be denied, upon the payment of the costs of the motion to set the same aside, by the said *Richard P. Hart*. It is further ordered, by and with the consent of *John Reynolds*, that the judgment record and proceedings connected with such record, filed the 6th day of *June*, one thousand eight hundred and eleven; in favour of *Richard P. Hart* against *Elisha Reynolds*, entered and filed by virtue of a warrant of attorney attached to said record, executed by *John Reynolds*, for ten thousand dollars, be amended, by inserting the name of *John Reynolds* instead of *Elisha Reynolds*, as often as the latter occurs in said record of judgment and such proceedings; and that the book of dockets, as far as it relates to said judgment, be altered, so as to conform to the amended judgment as to the defendant's name and the amount of the judgment, and that the day of signing said judgment be altered to the day when it was docketed, and that said amendments be made *nunc pro tunc*, so that the said judgment shall be, in all respects, a perfect judgment for ten thousand dollars, against *John Reynolds*, entered, signed, filed, docketed and inserted, in the book of dockets, the said 6th day of *June*, one thousand eight hundred and eleven: Provided, that the Clerk shall express in the said book of dockets, opposite said defendant's name, where said judgment is docketed therein, that the rights of *bona fide* purchasers from, and mortgagees of said *John Reynolds*, between the 6th of *June*, one thousand eight hundred and eleven, and the day of entering this rule, shall not be prejudiced by such alteration of said books of dockets, and provided a copy of this rule be attached to the said record. It is further ordered, that a copy of this rule be served on each of the judgment creditors of *John Reynolds*, whose lien accrued before this day, within six weeks from this time. It is understood, however, that this Court will make such order the next term of this Court as shall be just, in relation to the judgment in this cause, as to all judgment creditors of the said *John Reynolds*, whose lien accrued before the day of entering this rule, except *Walter Doe* and *James Taylor*, provided application be duly made therefor, the next term of this Court, and not afterwards.



awarded to *Chichester & Van Wyck*, and the rights of the parties fully settled. Now here is nothing *in fieri*. The various executions were levied—a sale made under the direction of the Court—the avails paid into Court to abide our order, which awarded the money to *Chichester & Van Wyck*—and that money has been actually paid. The order of the Court has been executed. It is, at least, doubtful, on this ground alone, whether we have power to disturb the dispositions which have been made—whether this money has not passed beyond the bounds of our summary jurisdiction. It is true that a matter once passed upon, in this way, is not deemed technically *res judicata*. It may be opened. We will hear it again, upon good cause being shewn; but where the order made has been carried into full execution, and the party has gone off with the avails in his pocket, it is deserving of great consideration, at least, whether we can bring him back into Court upon motion, and dictate the course he shall take, whatever additional light may be thrown around the subject; and this, in a special manner, where all has gone forward in good faith. Take the case of a motion to enter satisfaction upon the judgment roll, on the ground that the money has been paid: the defendant swears to the payment, which the plaintiff as solemnly denies: the case being balanced, the motion is denied. At another term, the defendant renews his application, upon the ground that he has since discovered a release, or receipt of the plaintiff, acknowledging that he had received the money. We might hear the application, and grant the necessary relief, provided the judgment yet remained *in fieri*; but suppose, in the mean time, that the money had been paid to, and pocketed by the plaintiff, I should doubt the power of the Court to afford redress in this manner. The suit is at an end, and the whole becomes a matter *in pais*. So of a motion for a new trial, on the ground that undiscovered evidence was behind, which is refused; and the judgment perfected and execution had; a second application would hardly be received, under such circumstances, however strong the appeal. There is a point at which these summary applications should cease, like every other litigation, for the sake of certainty and social quiet.

UTICA,  
Aug. 1824.

*Chichester*  
v.  
Candee

UTICA,  
Aug. 1824.

Chichester  
v.  
Cande,

But there is a precedent which is very direct to bear us out in amending this proceeding on the part of *Chichester & Van Wyck*, even were the money now in the hands of the Clerk. I allude to the case of *Close v. Gillespy*, (3 John. Rep. 526.) A judgment had been signed and docketed upon a warrant of attorney; but, through mistake, the name of the defendant's attorney was neither subscribed to the *cognovit* nor inserted in the roll. *Mancius*, having obtained a subsequent judgment against the defendant, a motion was made by the plaintiff to amend the proceedings *nunc pro tunc*. Now that record was invalid. Both parties considered it so; and the application was opposed because the rights of *Mancius* were to be affected by the amendment. Executions on both judgments had been delivered to the Sheriff, the execution of *Close* being first delivered, and both he and *Mancius* claimed a preference; yet *Close* was allowed to amend, though both executions were levied on the same property. The Judge who gave the opinion of the Court, declares broadly, (and in this he is sustained by all the authorities) "I cannot perceive that our right to amend, in case of the mistake of one of our officers, is to be controlled by the effect which is to be produced in another case. All amendments affect, more or less, third persons." That case is much in point; and, indeed, appears to me precisely parallel in principle with the one before us, the application for an amendment in which comes strongly commended to us by the principles of justice. *Chichester & Van Wyck* had a judgment and execution, perfect in every particular, as it respects personal property, except in the mere formality of filing in the Clerk's office. Instead of being answered by a constructive docket-notice, which was deemed sufficient for the junior creditor in *Close v. Gillespy*, *Russ* had actual notice, in the most explicit manner, by an execution and levy. We leave him in possession of all the rights upon which he could ever calculate, in legal propriety, without granting his motion. This must be denied; and *Chichester & Van Wyck* must take the effect of their motion to amend.

SUTHERLAND, J. It is, perhaps, proper to add, that in forming the opinion which has been delivered, we must not

be understood as questioning the case of *Barrie v. Dana*, or as doubting that, in all cases, the roll should be filed before execution can issue. We have been governed much by the peculiar circumstances attending this particular case. The subsequent creditor knew of the judgment, and relied solely on technical ground to defeat it. We hear no complaints from the party defendant.

UTICA,  
Aug. 1824.

Jackson  
v.  
Miller,

Rule accordingly.

JACKSON, *ex dem.* WILLIAMS and WASHBURN, against MILLER.

R. WESTON, for the defendant, moved that proceedings be stayed, on the part of the plaintiff, till the costs of a former ejectment, brought by *Jackson, ex dem. Miller*, (the now defendant) against *Washburn*, one of the lessors of the plaintiff, for the same premises now in question, in which a verdict and judgment were rendered for the then plaintiff, and a writ of possession executed, in virtue whereof the (now) defendant was put in possession, be paid. It appeared, by affidavit, that on the trial of the first ejectment, *Washburn*, the defendant, made title, by a lease from *Williams*, the other lessor in this suit, and that *Williams* claimed as heir of his father. On the trial of this cause, the same title came in question, on nearly the same evidence as in the first; that a verdict was taken therein for the (now) plaintiff subject to the opinion of the Court, upon which a case had been made, but not yet argued, though it had been noticed for argument by the defendant's attorney. *Washburn* had absconded shortly after the trial of the first action, the costs of which had never been paid.

A motion to stay proceedings in a second suit, till the costs of a former suit for the same cause are paid, is in season, if made at any time while the latter is in a course of litigation.

Thus, the court will hear it after verdict for the plaintiff in the second cause, subject to the opinion of the court, and a case made and noticed for argument by the defendant.

This motion was made on the authority of *Jackson, ex dem. Livingston et al. v. Edwards*, (1 Cowen's Rep. 138.)

D. Russell, contra, said the application was too late. The Court might as well be called on to stay a writ of possession, after judgment docketed. Where the defendant has thought

UTICA,  
Aug. 1824.

Marsh  
v.  
Eastman.

proper to meet the question of title upon its merits, and that has been decided against him, the Court should not listen to an application of this kind. There is no case to be found where such an application has been sustained, at this stage of the proceedings. It would be unjust to permit a party to lie by, until the costs of the plaintiff have accumulated by a trial and verdict; and after nearly all the expense has been incurred which could arise in the whole course of the suit, then obtain a stay of proceedings. The application might, and should have been made at an earlier stage of the cause; and has been waived by delay.

*Curia.* We think otherwise; and that the application comes before us in season, if made at any time while the cause is in a course of litigation.

Motion granted.

---

MARSH against EASTMAN.

On certiorari, the defendant cannot compel a return.

His course is to *non pros* the plaintiff in error, if he does not cause a return to be made.

On certiorari to a Justice's Court. The parties had proceeded to an issue of *in nullo est erratum*, without the Justice's having made any return; and now,

A motion was made, on the part of the defendant, for a rule requiring the Justice to make a return.

*Curia.* He should *non pros* the plaintiff, if he does not cause a return to be made. The defendant has no right to call upon the Justice to make a return. This is the business of the plaintiff.

Motion denied.

UTICA,  
Aug. 1824.

In the matter of GILBERT against THE JUDGES of the Court  
of Common Pleas of the county of NIAGARA.

Underwood  
v.  
Irving.

A VERDICT, in the Common Pleas of Niagara had been rendered against Gilbert, in favour of one Tuttle. Gilbert brought error, and put in bail, after which Tuttle sued out a *ca. sa.* on which Gilbert was arrested. The Common Pleas afterwards set this writ aside, on the ground that the writ of error was a supersedeas of execution, but imposed the condition that Gilbert should stipulate not to bring false imprisonment. And now,

A motion was made for a mandamus, commanding the Judges below to strike out this condition; but,

The Court were clear against the motion, and denied a rule to shew cause. They said that requiring this condition was a mere matter of discretion with the Court below; and this Court would not interfere.

Motion denied.

On setting aside a *ca. sa.* for irregularity, the court of common pleas required the party against whom it issued to stipulate that he would not bring false imprisonment; and on motion to this court for a mandamus requiring them to vacate the condition, held, that this was matter of discretion in the court below, with which this court would not interfere.

In the matter of UNDERWOOD, an insolvent debtor, against  
The Hon. J. T. IRVING, First Judge of the Court of Common Pleas of the city of New-York.

On the 6th day of March, 1824, the insolvent presented his petition to the Hon. J. T. Irving, First Judge of the Court of Common Pleas of the city of New-York, for a discharge under the "act to abolish imprisonment for debt in certain cases," passed April 7th, 1819. His honour made the usual order for the creditors to appear on the 24th of May following, and directed by this order that the same should be published for

creditors, and a publication of only 6 weeks, and then an order, by mistake, for assignment, which is made, the second order is a nullity, being made without jurisdiction, and the commissioner may refuse to sign the discharge.

On an application for a discharge, under the act to abolish imprisonment for debt in certain cases, (sess. 42, ch. 101) and order for 10 weeks' advertisement to

UTICA,  
Aug. 1824.

Underwood  
v.  
Irving.

10 weeks. On the 24th May, affidavits of publication were produced, and no person appearing to oppose, the usual order for an assignment was made, the assignment executed, and on the next day a certificate was produced from the assignees appointed by the Judge, that the insolvent had executed the assignment. But, on application for a discharge, the Judge stated, that since making the order for assignment, he had discovered that two of the affidavits of publication stated the same to have been made six weeks instead of ten. The attorney of the insolvent was ignorant till then, that the affidavits were defective ; and he insisted, that the Judge was bound to sign the discharge, it being too late after making the order and executing the assignment, there being no objection on the score of want of good faith in the insolvent, to inquire into the regularity of notice. But the Judge was of a different opinion, and refused to sign the discharge. The omission to advertise the ten weeks was through inadvertence.

A motion was now made for a mandamus, commanding Judge Irving to proceed and grant the discharge, and

R. Sedgwick, for the motion, cited 5 L. N. Y. 116, a. (sess. 42, ch. 101, s. 2) and insisted that it was intended by the law that the whole investigation to be made by the Judge, the whole trial, &c. should be made before the order for assignment. When that order is made, all prior questions are *res judicata*. It is certain that there can be but one trial by jury ; and it is well understood that all questions of fraud are to be settled, if heard by the Judge, before granting the order. A *fortiori*, questions of form, notice, &c. ought to be adjudged before that time.

The 3d section of the act is imperative, that upon the insolvent's producing a certificate, &c. the Judge shall declare under his hand and seal, &c.

He cited the case of *Bradstreet*, (13 John. 385) as in point. The ground on which the Court held, in that case, that the Recorder could vacate the order, was collusion to prevent the creditors from opposing. Besides, the whole matter was there *in fieri*, when the Recorder was applied

to, to vacate the order. The assignment had not been made and certified. How can the assigned property in this case be got back? The assignees hold it in trust for the creditors. The Judge had executed his powers, and the assignment vested the property in the assignee.

UTICA,  
Aug. 1824.

Mann  
v.  
Swift.

*Curia.* We do not view the matter in this light. The first order made pursuant to the statute had been disregarded. The 10 weeks advertisement was necessary to give the commissioner jurisdiction. Till this was done, he had no authority, and the second order was a nullity. The assignment must probably share the same fate, though it is not necessary to pass upon the effect of this; and we must not be understood as doing so. We are not to be guided by a consideration of the embarrassment which may arise from that act.

Motion denied.

### MANN against SWIFT.

On certiorari to a Justice's Court. The return of the Justice merely referred to the copy of the affidavits on which the certiorari was founded, and stated that "the same were substantially true, except such parts as relate to the separation and drinking of spiritous liquors by the jurors who tried said cause, which may be true, but the following is what came to my observation," &c.

The return to a certiorari must contain a complete history of the proceedings in itself—not by reference to the affidavit on which it is founded.

*M. Hoffman* moved to set this return aside as irregular.

*J. Lynch*, contra.

*Curia.* This practice of referring to, and adopting the affidavit on which the certiorari is founded, is irregular. The return should contain a complete history of the proceedings in itself. Not doing so, it must be set aside.

Rule accordingly.

UTICA,  
Aug. 1824.

Rogers  
v.  
Coleman.

ROGERS *against* COLEMAN.

Debt on bond to perform covenants—issue and verdict for plaintiff, but no assignment of breaches nor assessment of damages by the jury: the plaintiff may afterwards assign breaches and have his damages assessed upon a writ of inquiry, under the statute, (*sess. 36, ch. 56, s. 7, 1 R. L. 518.*)

DEBT on bond for the performance of covenants. Plea, *non est factum*. Upon this plea the plaintiff proceeded to trial, and took a verdict for the plaintiff, without having yet assigned breaches, at the *Monroe* Circuit, in *March* last. *April 22d*, the plaintiff's attorney served the defendant's attorney with a copy of the assignment of breaches, and with notice of executing a writ of inquiry, for the *4th* of *May*, before the Sheriff of *Monroe* county, on which day it was accordingly executed.

*A. Samson*, moved to set aside the proceedings as irregular. He said there should have been an assignment of breaches, and an assessment of damages by the jury who tried the cause. He cited *Tuxbury v. Miller*, (19 *John. Rep.* 311.)

*S. M. Hopkins*, contra.

*Curia*. The ordinary practice is to assign breaches, and have the damages assessed by the jury who try the cause, yet, where this is omitted, we are clear that the plaintiff is not foreclosed, but may proceed as he has done in this case.

Motion denied.(a)

(a) *Vid.* 1 *Saund.* 58, n. (1) and the cases there cited, and forms given by Serjeant *Williams*. Also, 2 *Saund.* 187, a. 187, b. n. (2) where this practice of assigning breaches and assessing damages, after verdict, and before judgment, is mentioned and approved of by him. And he says that the form of entering the suggestion may be the same as in case of judgment on demurrer, which he gave in 1 *Saund.* 58, n. (1). The proceeding in *England* is founded on the 8 & 9 *W. 3, c. 11*, of which our statute, (*sess. 36, ch. 56, s. 7, 1 R. L. 518*) is nearly a copy. One difference; however, is, that the writ of inquiry may here run to the Sheriff, to summon a jury before the Circuit Judge, or himself, to inquire, &c. but in *England* it is confined to the Assizes. The form (which is on judgment upon demurrer) given by Serjeant *Williams*, is now well established, having undergone the revision and been approved both by *Ld. Alvanley*, Ch. J. in *Hankin v. Broomhead*, (3 *B. & P.* 607, 611) and by the House of Lords, on error, in



*Johnes v. Johnes*, (3 Dow's Parl. Cas. 1 to 23) in which the Ld. Chancellor read the form from the record, said it was copied from Mr. *Williams'* note, and iterated the compliment bestowed upon that learned practitioner by Ld. *Alvanley*, in *Hankin v. Broomhead*. *Johnes v. Johnes* travelled through the Court of Exchequer Chamber, silently, into the House of Lords, where it was argued for the first time, which accounts for some expressions of the Lord Chancellor, in the opinion which he gives in that cause, and which, as it is an able commentary upon the statute, and the form of proceeding under it, I have given below.

UTICA,  
Aug. 1824.  
~~~~~  
Rogers
v.
Coleman

" Ld. ELDON, C. In attending to this case one or two circumstances presented themselves, which rendered it proper to postpone proceeding to judgment upon it, for a few days. In looking at *Hankin v. Broomhead*, it appeared that Lord *Alvanley* (in justice to whose memory he must say that he never in his life knew a more attentive and diligent judicial character) lamented that the Court had never been moved to settle the proper mode, of entering up judgment on the statute, in cases of this nature. The present judgment had not, except in form, received the authority of a court of justice, and he must say that this House had not been properly treated, when, instead of having the case argued below, all the Courts had been passed over, except as to form, and the record brought there in a manner which made it be considered as having been brought merely for delay; without any suggestion which could lead their Lordships to call for the usual assistance, in a case which it was most fitting to have discussed in the presence of all the Judges. This mode of proceeding left them without the benefit of that assistance in the regular way, which, however, in the exercise of a cautious and diligent inquiry, with respect to a question which had not before received a judicial decision, they ought to procure in some way, and he charged himself with that duty. In the mean time he begged he might be understood as giving no opinion; and, indeed, on a point which had so much distressed the profession, he could not trust himself so far as to rest satisfied with any opinion which he himself might have formed. He stated this much the rather because the question had not been argued below, and the writ of error had been considered as having been brought merely for delay, and the cause had, therefore, been taken out of its course. If its nature had been understood, he might have thought it right that farther time should be allowed for preparation, before argument, though that would have been unnecessary, as the case had been very ably argued on both sides.

" The statute (8, 9, *Geo. 3. ch. 11*) had been passed for this reason: Before that statute, where there was a bond for performance of covenants, with a penalty, for instance, of 50,000*l.* in case of a breach, and action brought, the plaintiff had judgment for the whole sum, though the actual damage might be a mere trifle, or, at least, far short of the whole penalty, and defendant was obliged to go for relief to a Court of Equity, which, by directing an issue, &c. ascertained the real damage; and in this expensive and circuitous mode justice was done. The object of the legislature was to relieve defendant from the necessity of resorting to this course, by em-

UTICA,
Aug. 1824.

Rogers
v.
Coleman.

powering the court of law to confine the legal to the real right; and it was remarkable, after the passing of all these statutes, how far the words had fallen short of the construction which the Courts had put upon them. The remedy then devised by the statute was this, "that in all actions which, &c. shall be commenced or prosecuted in any of H. M. Courts of Record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements, in any indenture, deed or writing contained, the plaintiff or plaintiffs *may* assign as many breaches, [meaning in the declaration] as he or they shall think fit; and the jury, upon trial of such action or actions, shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, [meaning in the declaration] as the plaintiff, upon trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict, as heretofore hath been usually done in such like actions." So far the statute related strictly to cases where breaches were to be assigned in the declaration: It then went on to cases where judgment was given without breaches previously assigned. "And if judgment shall be given for plaintiff, on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll *may* suggest as many breaches of the covenants, &c. as he shall think fit, upon which shall issue a writ to the Sheriff of that county where the action shall be brought, to summon a jury to appear before the Justice or Justices of Assize or *Nisi Prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby, &c. &c." In the obvious construction the remedy was by suggesting on the roll these breaches, and the subsequent part was so modified, that the judgment for the whole sum stood as a security for the damages, costs, and charges, together with such farther damages as might be sustained by future breaches, plaintiff suggesting such breaches, again going to a jury, and so from time to time satisfying himself. But the Courts had construed this statute so as to extend the remedy to cases not strictly within the words, and the case of *Ethersay v. Jackson* went a great way to that purpose. That was an action of debt, on bond for performance of covenants. Plea, *non est factum*, and issue thereupon, and notice of trial given. Plaintiff then entered a suggestion on the roll, and assigned breaches under the statute, and had a verdict—motion to set aside for irregularity, because the suggestion on the roll, in this case, was not warranted by the statute; for it gave liberty to suggest only after judgment, and even that only in three cases—in judgments on demurrer, confession, or *nihil dicit*. The Court said there was no foundation for this objection—that statute required a liberal and beneficial construction, it being made in advancement of justice and ease of defendants—that it was manifest the legislature contemplated cases where plaintiff had not originally assigned breaches in the declaration, which statute enabled him to supply by suggestion on the record even after judgment, and *a fortiori* before. He was bound to suppose that this was just, and yet where a statute gave power to assign breaches in the declaration, and to suggest them on the roll after judgment, an ordinary man would say, that it was not hastily to be inferred

that it sanctioned a third mode. But it had been properly said, that this was a remedial statute, and that, in advancement of the remedy, all was to be done that could be done in a way consistent with any construction of it. This showed how anxious the Courts were to extend the remedy to cases where it was wanted. When that case occurred where it was thought that the mode of entering up two judgments was wrong, *Ld. Alvanley, (Hankin v. Broomhead, 3 B. & P. 607)* adverted to a form, of which this was nearly a transcript, which had been suggested by Mr. Serjt. Williams, (1 *Saund.* 58, n. 1) to which he (*Ld. A.*) said he saw no objection. So far there was authority that this judgment was good, attending to what had been said by Serjt. Williams, in his note (2) in 2 *Saund.* 187, and though one who had held no judicial situation could not regularly be mentioned as an authority, yet he might say, that to any one in a judicial situation it would be sufficiently flattering to have it said of him that he was as good a common lawyer as Mr. Serjt. Williams, for no man ever lived to whom the character of a great common lawyer more properly applied. There was, however, no judicial decision on the point. *Ld. Alvanley* had expressed his wish that the Courts had been moved to settle the proper mode of entering up judgment in such cases; and he should be sorry to part with the present case without having it settled, not only as a correct judgment for the present, but as a precedent for the future; and he should, therefore, use the means in his power to ascertain whether that opinion was sound, which he himself had formed, but which he would not now state."

"Nov. 30, 1814. *Ld. Eldon, C.* This was an action of debt, on bond, with penalty conditioned for the quiet enjoyment of certain purchased premises, and breaches were assigned in the replication, to which defendant below demurred, and after joinder in demurrer, no counsel appearing to argue the case for defendant, plaintiff had judgment, which was in the following form: [*He read it from the record.*]

"It would be observed that there was here a regular continuance from Hilary to Easter. There was no continuance from Easter to Trinity, but a day was given in M. T. so that the continuance might be said to be from Easter to Michaelmas Term. Then error was brought in the Exchequer Chamber; but there was no argument, nor any suggestion as to what was the error in the judgment. The matter then came to that House, where it was the clear right of the subject to bring a case in this way, and, if there was error, to call upon their Lordships so to declare.

"A few words as to the chief point to which he had before adverted. The simplicity of the common law restricted parties to one judgment in the same cause; but this simplicity had been made to give way by several acts of parliament, such as enclosure acts, &c. and under these acts there might, in the same cause, be a variety of judgments. Their Lordships were aware that, where there were covenants, with a bond and penalty for performance, if any one of them was broken, the whole penalty was gone, though the real damage in consequence of the breach might be but small in comparison. The subject was, therefore, obliged to go to a Court of Equity, which, by directing an issue of *quantum damnificatus*, &c. ascertained the real amount of the damage; and, on payment of the damages and costs of

UTICA,
Aug. 1824.

Rogers
v.
Coleman.

UTICA,
Aug. 1824.

Rogers
v.
Coleman.

the proceedings, the party was relieved, the penalty standing as a security for damages that might accrue by any future breaches, and leave being given to apply to the Court *de tempore in tempus* for similar issues. In the time of King *William* it was thought proper to relieve defendant by giving the courts of law an equitable jurisdiction; and plaintiff, upon action on bond and judgment for the whole penalty, might suggest different breaches on the roll, and then pray that the real amount of the damage suffered might be inquired of by a jury, and the Court was to find means to award execution: and, in case of future breaches, plaintiff might apply for interlocutory judgments, and future inquiries, *de tempore in tempus*. And the Court, in furtherance of the object of the act, construed *may* as compulsory on the plaintiff to proceed in this way. The form, then, by this mode, was, after judgment apparently final, to suggest breaches on the roll, as they occurred, and so to have judgment after judgment from time to time. This was felt to be attended with difficulties; and the late Mr. Serjt. *William*, an eminent pleader, not merely from his acquaintance with the forms, but because there was no man whose mind was more richly stored with the principles of pleading, suggested a form, of which this was nearly a transcript. But errors having been suggested here for the first time after passing the Courts below, there was one point with respect to which, as it had not been found to have been decided before, and as this would be a precedent for the future, he had thought it right, though he had formed an opinion, privately to consult those whose assistance was most material under these circumstances. The objection was of this nature, that the law required the parties to be constantly in Court, that when it was stated on the record that the Court was not prepared to give judgment on any particular term, the parties should be ordered to attend on a given day in the next term, and so on from term to term. In this way the cause had been continued from H. T. to E. T., and then an interlocutory judgment was given to the extent, that it appeared to the Court that plaintiff below ought to recover his debt. But then the record went on, "because it is convenient and necessary that judgment should not be given hereupon, until the truth of the aforesaid breaches, &c. shall have been inquired into, &c." giving a day to the parties not in T. T. but in M. T., directing an inquiry, in the mean time, before the Judges of Assize, which, from the ordinary mode of holding the Assizes, could only be executed subsequent to T. T. It was said, however, that the reason for the ordinary continuance ceasing, there was no occasion for it in this instance, and that the question was, not what was necessary by the common law, but whether the record was sufficient to satisfy the enactments of the statutes. And it had been said, on the other hand, that there might, by possibility, be no Assizes before Michaelmas. True; but a day was given in that term. and there might be a farther continuance. Attending, then, to the reason of the common law and the object of the statutes, it was clear that this record was sufficient and right, as providing, in every respect, for the due execution of the statute; and the point for their Lordships' consideration was, whether there was error with reference to the due execution of the statute. The common law said there must be only one judgment, but in the due execution of cer-

tain statutes there must be several judgments ; and if this record satisfied the statute, it appeared to him to be sufficient *Salk. 700. 2 Ld. Raym. 775*) The *ca. sa.* need not be made returnable the term after it issued, the object being to give time for payment of the debt, &c. and the reason therefore ceasing. It was otherwise, he believed, on *mesne process* ; but this showed that the reason of the thing was to be considered, and they would apply the common law reason as far as it enabled them to go in due execution of the statute. That was his view of the case, and having waited to see whether others, whose minds were more enlightened on the subject than his own, concurred with him, he was now prepared to recommend to their Lordships to decide that there was no error on this record."

UTICA,
Aug. 1824.
Stewart
v.
Atkins.

STEWART against ATKINS.

THE *capias ad respondendum*, on which the defendant endorsed his appearance, was signed by *O. M. Willey*, attorney ; and the notice of the rule to plead, endorsed upon the declaration, was signed by the same attorney, and served personally on the defendant, who retained an attorney, who wrote and inquired of his agent whether any rule to plead had been actually entered, and received for answer that there had not. He, therefore, omitted to plead, and the plaintiff took judgment by default. On further search, it turned out that the rule to plead was entered in the name of *Hastings & Willey*, who were partners, but whose business was done in the name of *Willey*, as attorney. The mistake, therefore, arose from the search being made in common rule book (W) instead of (H).

A. Samson, moved to set aside the proceedings for irregularity.

C. P. Kirkland, contra.

Curia. For the reason, alone, that the defendant has been misled by this proceeding, we set aside the default, without costs.

Rule accordingly.

Because the defendant was misled, the court set aside the default, without costs.

H & W, attorneys, being partners, issued a *cap. ad. resp.* on which the defendant endorsed his appearance, in the name of *W*, as attorney, filed a declaration, and entered a rule to plead as on the motion of *H & W*, and gave notice thereof in the name of *W*. The defendant's attorney searched the common rule book (W) found no rule entered, and neglected to plead, the rule being entered in rule book (H) and a default was, therefore, entered, for want of a plea ; and because

UTICA,
Aug. 1824.

Bennett

v.
Davis.

BENNETT against N. DAVIS and W. M. DAVIS.

The judgment and proceedings in entering up a judgment in one term cannot be made to relate to, and be entitled as of a term preceding.

And where a bond and warrant of attorney to confess judgment, were executed by two, on the 10th April, 1824, and one of them died on the 14th April, a judgment entered thereon during the subsequent May term, as of the preceding February term, was set aside as irregular.

JUDGMENT for the plaintiff on bond and warrant of attorney. The proper papers were filed, and the judgment perfected, on the 6th day of May last, being after the commencement of May term. The bond and warrant were executed the 10th of April last, the latter containing the usual clause authorizing any attorney, &c. in term or vacation, &c. to confess judgment for the obligors, and to release all errors, &c. The declaration was entitled of February term, 1824, and the *placita* was of the same term. N. Davis, one of the defendants, died on the 14th April last.

J. A. Spencer, moved to set aside the judgment as irregular, on the ground that N. Davis, one of the defendants, died before the term at which the judgment was entered. He said, the judgment being entered in May term, could not be made to relate to the previous term. If this should be deemed an error, and, as such, capable of being released, within the provision in the warrant of attorney, the power conferred by that instrument was gone, being revoked by the death of N. Davis. He referred to 1 *Dunl. Pr.* 364, and the cases there cited, and *Gee v. Lane*, (15 *East*, 592.)

G. C. Bronson, contra, cited *King v. Shaw*, (3 *John. Rep.* 142) *Mackay v. Rhineland*, (1 *John. Cas.* 410) 2 *Archb. Pr.* 15; *Tidd*, 495; *Gladwin v. Scott*, (*Barn.* 53) *Odes v. Woodward*, (2 *Ld. Raym.* 766; *id.* 849, S. C.) 1 *Salk.* 87, S. C.; 3 *Salk.* 116, S. C.; 1 *Saund.* 219, c.

The Court set aside the proceedings as irregular, upon the grounds taken by Mr. Spencer.

Rule accordingly.

UTICA,
Aug. 1824.

In the matter of MARSH against WENDOVER, Sheriff of the
city and county of New-York.

Gibbons

v.

Wendover.

On the 25th of January, 1823, Gibbons recovered judgment in this Court, against *W. Messerve*, for \$1514.10. *Stamler*, on the same day, recovered a judgment, in this Court, against *Messerve*, for \$1789.10. On the 22d of February, 1823, writs of *fi. fa.* issued on these judgments; and on the 29th April, 1823, *Gibbons & Stamler* became joint purchasers for \$600 of the real estate of *Messerve*. They received the Sheriff's certificate, by which they were entitled to a Sheriff's deed, on the 29th July, 1824.

Land passes by a general assignment under the insolvent act, and a creditor whose judgment against the insolvent is perfected after the assignment has no lien; and, therefore, cannot redeem within the act, (sess. 43, ch. 184, s. 3.)

On the 24th April, 1823, *Stevens* recovered a judgment in the New-York Common Pleas, against *Messerve*, for \$218.04, which was assigned in August, of the same year, to *Reed*.

On the 13th May, 1823, *Messerve* was discharged under the act to abolish imprisonment for debt in certain cases, (sess. 42, ch. 101) and *Stamler* became his assignee.

On the 25th July, 1823, *Stevens & Rindge* recovered judgment in the New-York Common Pleas, against *Messerve*, for \$405.76, which, on the 16th of February, 1824, they assigned to *Marsh*. The judgment was upon a *relicta* and *cognovit*, reserving the exemption of *Messerve's* body.

On the 28th July, 1824, *Reed*, as the assignee of *Stevens*, redeemed from *Gibbons & Stamler*, and on the same day *Marsh* redeemed from *Reed*.

J. Leveridge & S. M. Hopkins, moved for a mandamus, commanding the Sheriff to convey to *Marsh*. They contended, that the conveyance of the land, by the assignment under the insolvent act, or by operation of law, from *Messerve* to his assignees, would not prevent the judgment of *Stevens & Rindge* operating as a lien, though not recovered till after the assignment. The discharge was under the body act, and left the previous and future acquisitions of the insolvent liable to the judgment and execution of creditors. *Stamler*, being an assignee for all the creditors, was their trustee, and

UTICA,
Aug. 1824.

Brown
v.
Hankerson.

could do no act to prejudice the rights of his *cestuy que trusts*.
(*Cas. Eq. Abr.* 384.)

J. Platt, contra.

Curia. We think the assignment placed the property beyond the reach of the judgment, which was not a lien. *Marsh*, therefore, had no right to redeem, and the motion must be denied.

Motion denied.

BROWN against HANKERSON.

The arbitration bonds were dated August 21st, 1813, and the award was dated August 23d, 1813, and recited bonds dated the 21st of August, last past; held, that if a correct recital were necessary, it should be construed, in support of the award, to refer to the day, i. e. the 21st last past, instead of the month, i. e. August, last past.

Where the award was that *H* should deliver the said farm to *B*. &c. and that *B* should pay *H* certain moneys; held, that the delivery of the farm was a consideration for the money, and the award being uncertain, in not describing the farm by reference or otherwise, the award of the money was also void.

If that part of the award, which is void, is so connected with the rest as to affect the justice of the case, the award is void for the whole.

ERROR from the Court of Common Pleas of Schoharie county. The action below was debt on a general arbitration bond, executed by *Brown*, and payable to *Hankerson*, dated the 21st day of August, 1813, and conditioned that the award should be made, &c. on or before the 23d day of August, thereafter.

Plea—No award.

Replication—That the arbitrators mentioned in the condition of the bond, within the time limited, &c. made their award of and concerning the premises in the said condition mentioned, by which they awarded that all actions, &c. arisen before the day of the date of the bond, should cease, &c. that each party should pay his own costs, &c. and that *Hankerson* should deliver, or cause to be delivered to *Brown*, his right and claim of the said farm, reserving the privilege of taking off the summer crops when ripe, and of leaving the house by the first of September (then) next; that *Brown* should, on or before the 1st day of January (then) next, pay \$17.50, and should further pay unto *Hankerson* \$17.50, on or before the 1st day of August (then) next; and that, on the payment of the \$35, the parties should execute mutual general releases, of all demands, &c. from the beginning of the world to the 21st day of August (then) last past, and assigning a breach in the non-payment of the money.

Rejoinder, denying that any such award was made, and issue.

On the trial, the plaintiff offered in evidence an award, dated *August 23d*, 1813, reciting mutual arbitration bonds between the parties, bearing date *August 21st*, now *last past*, the award being in other respects as set forth in the replication. The award was objected to, as not pursuing the authority conferred by the bonds. The Court overruled the objection, and the jury, under their direction, found a verdict for the plaintiff, and assessed his damages to \$40,32. The defendants excepted to this opinion, and there being judgment for the plaintiff below, brought error to this Court.

UTICA,
Aug. 1824.

Brown
v
Hankerson.

T. Lawyer, for the plaintiff in error. To support the objection taken upon the trial, he cited *Allen v. Watson*, (16 John. 205) *Fisher v. Pumbly*, (11 East, 187) *Macomb v. Wilber*, (16 John. 227) and *Foreland v. Manygold*, (1 Salk. 72.) And he insisted, 2dly, that the award was void for uncertainty, in support of which he relied upon *Schuyler v. Vandever*, (2 Caines' Rep. 235) *Cockson v. Ogle*, (Lutw. 350) *Kyd on Aw.* 194, 258, 259; 2 *Saund. Rep.* 293, a. note (1) and the cases there cited.

J. Cumming, contra, said the words "last past" might well refer to the day, viz. the 21st, and not the month; but if there was a clear mis-recital, this will not vitiate the award. (11 John. 103. 2 Mod. 169. 1 Salk. 72. 1 Ld. Raym. 715. 12 Mod. 534.)

Curia, per SUTHERLAND, J. The objection taken to the award, below, was, that it bore date the 23d August, 1813, and purported to be made by virtue of a bond of submission, which bore date "*August 21st*, now *last past*," whereas the bond declared on and produced in evidence bore date *August 21st*, 1813, being *August*, instant, instead of *past*. The arbitrators also awarded general releases between the parties, from the beginning of the world until the "*21st day of August last past*, being the day of the date of the arbitration bond," thus showing that the award was made under a bond of submission, of *August 21st*, 1812, whereas the bond decla-

UTICA,
Aug. 1824.

Brown
v.
Hankerson.

red on was dated *August 21st*, 1813; and consequently no authority was shewn to make the award.

The strict grammatical construction of the award is, perhaps, as contended for by the plaintiff in error. But the intention of the arbitrators is perfectly clear. They run into a mere inaccuracy of expression. To avoid such an objection we may, without any great violence, suppose that the words *last past* were intended by the arbitrators to refer to the *day*, and not to the *month*. (Vid. *Dy.* 376, c. *Ord. on Usury*, 61, n. *Cro. Jac.* 646.) These awards are frequently made and drawn up by illiterate men, and it will not do to test them by the strict rules of grammar. If there had, in truth, been another bond of submission in 1812, it was competent for the defendant to show it,

But the award is bad for uncertainty. It directs, "that the said *James Hankerson* should deliver, or cause to be delivered, to the said *George Brown*, *his right and claim of the said farm*, reserving the right of taking off the summer crops, when ripe, &c. and that the said *George Brown* shall, on or before 1st day of *January* next, pay, &c. No farm was mentioned either in the bond of submission or in any previous part of the award; nor is there any averment in the pleadings of the plaintiff in relation to it, (if, indeed, it could be helped by averment.) What farm the arbitrators intended is, therefore, altogether uncertain, and incapable of being ascertained.

In *Bedam v. Clerkson*, (1 *Ld. Raym.* 123) an award "that one of the parties shall deliver up to the other *a certain writing obligatory, or a certain bill obligatory*, which he had before," was held to be bad for uncertainty, no description either of the date, the maker, or the amount of the bond, being stated. So in *Cockson v. Ogle*, (*Lutw.* 169) an award "that the defendant shall deliver several books," &c. was held bad, the award not specifying what books. So in *Thinne v. Rigby*, (*Cro. Jac.* 314) an award that "the defendant should give security to the plaintiff, for the payment of £16, at two days," was held bad for uncertainty, not shewing what security he should give, whether by bond or otherwise. So, al-

so, in *Tipping v. Smith*, (2 Str. 1024) that the defendants shall give security, without specifying what, was held bad.

The award, being void in this particular, is void throughout, because the delivering of the farm by the plaintiff to the defendant, was the only act or thing which he was directed to do, and was the consideration intended by the arbitrators for the money which they directed the defendant to pay to him, and for the recovery of which this action was brought. (*Kyd on Aw.* 259, 260, and the cases there cited.) If that part of the award which is void is so connected with the rest as to affect the justice of the case between the parties, the award is void for the whole. (*Kyd on Aw.* 246.) The judgment below must, therefore, be reversed.

Judgment reversed.

UTICA,
Aug. 1824.

Jackson
v.
Jackson.

JACKSON, *ex dem*: DOX, against JACKSON.

EJECTMENT. The cause was tried at the last *Ontario* Circuit, before his Honor, E. T. THROOP, C. Judge, and a verdict found for the plaintiff. Afterwards, a case being made and settled on the part of the defendant, for the purpose of moving for a new trial, he obtained of a commissioner to do the chamber duties of a Judge of the Supreme Court, an order that all further proceedings on the part of the plaintiff be stayed until the further order of this Court, though it appeared that Judge Throop was at home, and might have been applied to for the order.

The plaintiff's attorney treated this order as a nullity, and proceeded to sign judgment.

E. Williams, moved to set aside all the proceedings subsequent to the order. He said the acts (*sess.* 36, *ch.* 16, 1 *R. L.* 322, and *sess.* 41, *ch.* 195, *s.* 1.) give these commissioners the same chamber powers with a Judge of this Court. To declare this order a nullity, would be to repeal the act.

An order to stay proceedings upon a case made for the purpose of obtaining a new trial, granted by a commissioner to perform the chamber duties of a judge of the supreme court, is not a nullity; but is void till revoked by the commissioner or set aside by the court.

UTICA,
Aug. 1824.

Jackson
v.
Jackson.

J. C. Spencer, contra. The statute must be taken in reference to the settled practice, which has been understood for 20 years, to confine the power of making this order to the Judge who tried the cause. Even this Court will not hear the question whether such an order shall be granted until it has been denied by the Circuit Judge. (*Buch v. Coles*, 3 *Caines' Rep.* 83.) I do not mean to contend that there may not be cases of necessity in which a temporary stay may be granted by a commissioner; but to interfere in this way, as a matter of course, is a palpable excess of jurisdiction. The statute is, in terms, broad enough to embrace orders for the allowance of classical studies to a clerk, yet the Court have reserved this exclusively to themselves, as a matter not fit to be delegated to commissioners. To say that any one of the 200 commissioners in the state may grant the order in question, and which is the same thing, if one refuses, you may appeal from him to another, will, in effect, be saying that no man shall have judgment in any case till the calendar of arguments is cleared.

Williams, in reply. If the order was improperly granted, the Court will strike the cause off the calendar or set the order aside; and with costs too; but it is one thing to say that it shall be set aside, and another that it shall be disregarded, and treated as a nullity. Here has been no application to the Court for any such purpose. Suppose one of your Honors had granted the order; could counsel say "It is void, because you did not try the cause?" The gentleman concedes all we ask, when he says a commissioner may grant the order from necessity. If the commissioner mistake the existence of this necessity, as if the Judge be at home when he was supposed to be absent, he should be asked to revoke his order, upon which it should come by way of appeal to this Court in the event of his refusal. As to orders of clerkship, this pertains to the admission of attorneys, which is the act of the Court; not a mere chamber duty.

Curia. The chamber powers of a commissioner are, by the statute, made equal to those of a Judge of this Court.

The expediency of granting such a power is not in question. The commissioner may have acted indiscreetly; but whether this be so or not, the party has mistaken his remedy. Should the commissioner refuse to revoke an order granted upon insufficient grounds, we might, on appeal, summarily review the matter, and revoke it ourselves. But the order cannot be treated as a nullity.

Motion granted.

UTICA.
Aug. 1824.

JACKSON
V.
M'MICHAEL

JACKSON, *ex dem.* DE FOREST & M'MICHAEL, against RAMSAY.

EJECTMENT for premises in *Rotterdam*, county of *Schenectady*, tried before DUER, Circuit Judge, at the *Schenectady* Circuit, *October*, 1823.

On the trial, it was shown that the declaration was served on the defendant, who was in possession, in the vacation after *January* term, 1823, and that it was returnable at the *May* term thereafter. Issue was joined in the vacation after *May* term.

The plaintiff claimed as devisee of the premises in the will of *A. M. M'Michael*, which was proved, dated *17th April*, 1818, shortly after which the testator died seised.

The defendant then introduced in evidence the exemplification of the record of a judgment recovered in the Court of Common Pleas of the county of *Schenectady*, by *William M' Martin* against *A. M' Michael*, the testator, for \$338¹⁴/₁₀₀, and also the exemplification of the record of a judgment recovered in the same Court by *Daniel Martin*, against the testator, for \$60⁷¹/₁₀₀, both which records were filed the *13th September*, 1817. The defendant

Matter of defence arising after issue joined must be pleaded *pro et contra* continuance.

This rule applies as well to ejectment as to other actions; as where the defendant acquires title by deed after issue.

But where R. purchased the premises at sheriff's sale on a judgment and execution against M. & took no deed; & then M's devisee brought ejectment, after issue joined in which, R. obtained a sheriff's deed; &

held, that this need not be pleaded; but might be given in evidence upon the general issue. A deed given by a sheriff upon a previous sale on execution relates back to, and, in judgment of law, is executed at the time of the sale.

Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other act shall have relation.

Cases supporting this rule considered; and applied to a deed executed more than 4 years after the sheriff's sale.

UTICA,
Aug 1824.

Jackson
v.
M^cMichael.

then introduced in evidence a *fi. fa.* against goods and lands issued upon the judgment of *Wm. M^cMartin*, tested 3d January, in the 41th year of our Independence, and returnable on the 2d Tuesday of May (then) next, endorsed for \$217,90, &c. and to which the following return was attached : " There being no goods and chattels to be found whereof I could levy the amount of debt and the costs due on the annexed execution, and another in favour of *Daniel Martin*, I have seised, and exposed to sale at publick auction, all the right and title of *A. M^cMichael*, deceased, of, in and to the following described lands, &c. (*part of the premises in question*) to *Philip Ramsay*, for the sum of \$15, being the highest sum bid for the same when sold, being on the 2d day of October, 1818.

John Corl, Under Sheriff."

The defendant also introduced in evidence a *fi. fa.* against goods and lands upon the judgment of *Martin*, tested 3d January, in the 42d year of our independence, and returnable on the 2d Tuesday of May, (then) next, to which was attached the following return : " There being no goods and chattels to be found whereof I could levy the amount of the damages and costs due on the annexed execution, and another in favour of *Wm. M^cMartin*, I have seised and exposed to sale at publick auction, all the right and title of *Alexander M^cMichael*, deceased, of and to all the following described property, situate, &c. (*part of the premises in question*) to *Philip Ramsay*, for the sum of \$300, being the highest sum bid for the same when sold, being the 2d October, 1818.

John Corl, Under Sheriff."

The defendant then offered in evidence two Sheriff's deeds, purporting to have been given by *Gideon Holiday*, Esq. former Sheriff of the county of *Schenectady*, to *Philip Ramsay*, the defendant, as a purchaser of the premises in question, at a sale of the same premises by the Sheriff, on the 2d day of October, 1818, by virtue of the two writs of *fi. fa.* before described. These deeds bore date the

12th August, 1823. To their introduction in evidence, the plaintiff's counsel objected, upon the ground that they were given since issue was joined; and should have been pleaded *puis darrein continuance* at the last August term, or, at all events, at the (then) Circuit Court before the trial of the cause; and it was agreed by the counsel that issue was joined on the 4th June, 1823. The consent rule was in the usual form. It was also objected that the deeds were void, being in violation of the 1st section of the act to prevent and punish champerty and maintenance; and also because they were not given within a reasonable time after the sale. The Judge rejected the deeds on the ground that they should have been pleaded *puis darrein continuance*.

A motion was now made for a new trial.

E. Yates, in support of the motion, denied that a plea *puis darrein continuance* was applicable to an action of ejectment. At any rate, it is confined to the case of an alien enemy. But if otherwise, the Sheriff's deeds were not new matter within the rule which requires such matter to be interposed by plea. This Court have often decided that a Sheriff's deed relates back to the time of the sale, although executed afterwards. (*Jackson v. Dickenson*, 15 John. 309.) The delay is the fault of the officer; and should not prejudice the purchaser. Indeed it is a general rule that a conveyance executed in pursuance of a previous contract relates back to the time of the contract. (*Jackson v. Bull*, 1 John. Cas. 81. *Jackson v. Raymond*, id. 85, n. (a) *Johnson v. Stagg*, 2 John. Rep. 510.)

It is not maintenance for a defendant to perfect a title *pendente lite*. (*Jackson v. Ketchum*, 8 John. 479.)

A. C. Paige, contra. The rule is peremptory, that where matter of defence arises after issue joined, it must be pleaded *puis darrein continuance*. This must be done the first opportunity, and before a term intervenes, (*Bull. N. P.* 309. 1 Selw. N. P. 147. 1 Chit. Pl. 635, 532. Tidd, 773. 5 Bac. Abr. 477, 6th ed. 3 Bl. Com. 317. *Jackson v. McConnell*, 11 John. 424.) If the matter of defence arise in-

UTICA,
Aug. 1824.

Jackson
v.
McCall.

UTICA,
Aug. 1824.

Jackson
v.
M^cCall.

intermediate the term and the next Circuit, it must be pleaded at the Circuit, to prevent a trial. (13 *John*. 157. 3 *Caines' Rep.* 173. *Tidd*, 773. 2 *Chit. Pl.* 677, n. 2 *Dunl.* 622.) These rules extend to actions of ejectment. (*Jackson v. Rich*, 7 *John*. 194. *Jackson v. Demont*, 9 *John*. 55, *per Kent, Ch. J.* *Jackson v. M^cConnell*, 11 *John*. 424. *per Spencer, J.* *Jackson v. Bell*, 19 *John*. 168.)

In this case, before issue joined, the defendant had no title. It was acquired by the deeds only. Without this, the levy, sale and return, even if accompanied with payment of the money, carried no title. They did not divest the estate of the debtor. (*Jackson v. Catlin*, 2 *John. Rep.* 248. 8 *John*. 520. *S. C. affirmed on error.* *Simonds v. Catlin*, 2 *Caines' Rep.* 61.)

The doctrine of relation takes place only where it becomes necessary for the preservation of the estate, or to promote the ends of justice; as to avoid the effect of an adverse possession, intermediate the conclusion of the contract, and the giving of the deed, (1 *John. Cas.* 65) or to render an intermediate sale by the grantee valid, (*id.* 81. 2 *John. Rep.* 510.) or to enable a grantee to sustain an action of trespass for cutting timber after the contract but before the deed, (12 *John*. 140) or to prevent a purchaser at a sheriff's sale being foreclosed from contesting the validity of a mortgage in an action of ejectment at law, a bill of foreclosure having been filed in Chancery before the execution of the sheriff's deed, but subsequent to the sale. (15 *John*. 309.) The general rule is otherwise. The deed does not, if there be no special circumstances to require it, relate to the time of the contract, (*Doe v. Telling*, 2 *East*. 256.)

But the deed was void within the statute of champerty and maintenance, (1 *R. L.* 172.) being a purchase of lands pending the suit. (1 *Hawk. P. C. ch.* 84, s. 9. *Jackson v. Ketchum*, 8 *John*. 479. *Same v. Demont*, 9 *id.* 55.)

Again; the deed should have been executed within a reasonable time. Is it competent to wait several years? Can the deed be executed at any distance of time? The delay must not be unreasonable. (*Catlin v. Jackson*, 8 *John*. 552, *per Lansing, Chancellor.*)

The doctrine of relation is held only as between the parties to the grant. It is never adopted when third persons, not parties or privies, will be prejudiced. (12 *John*. 140. 4 *id.* 234. 3 *Caines' Rep.* 263. *Jac. L. D. Relation.*)

UTICA,
Aug. 1824.
JACKSON
v.
M'Call.

Curia, per SUTHERLAND, J. The principal question in the case is, whether a Sheriff's deed, executed after issue joined in the cause, the sale having been made before the commencement of the suit, can be given in evidence by the defendant under the general issue, or should be pleaded *puis darrein continuance*.

The declaration was returnable *May* term, 1823. The consent rule bore date the 23th of *May*, and issue was joined the 4th of *June* in the same year. The Sheriff's sale of the premises in question was made on the 2^d of *October*, 1818, but the deeds which were offered in evidence, and which were made in pursuance of that sale, were dated the 12th of *August*, 1823.

That the general rule, requiring matter of defence which has arisen after issue joined, to be pleaded *puis darrein continuance*, is applicable to this as well as other actions, is abundantly settled in this Court. (*Jackson, ex dem. Colden, v. Rich*, 7 *John*. 194. *Jackson v. Demont*, 9 *John*. 60. *per Kent, Ch. J.* *Jackson v. M'Connell*, 11 *John*. 424. *Jackson v. Bell*, 19 *John*. 168.)

But it is contended on the part of the defendant that the deeds relate back to the day of sale by the Sheriff; and in judgment of law are considered as having been then given. The lessors of the plaintiff derived their title under the will of *Alexander M'Michael*; and the Sheriff's sale was under judgments obtained against *M'Michael* in his life time. When the defendant entered into possession does not appear; but it is to be presumed that he entered under the title acquired by him at the Sheriff's sale. The lessors of the plaintiff stand in the same relation to the defendant that *Alexander M'Michael* would, had he been living and made a lessor. This, the *efore*, is a case to which the doctrine of relation is peculiarly applicable, there being no strangers or third persons, whose interest can be affected by it. That doc-

UTICA,
Aug. 1824.

West
v.
Beach.

WEST *against* WENTWORTH & BEACH.

In *assumpsit* on a note payable in specific articles, the measure of damages is the highest market price of those articles at any time between the notes falling due and the time of the trial.

So in *trover*, the damages are measured by the highest price intermediate the time of conversion and trial.

ASSUMPSIT, tried at the *Onondaga* Circuit on the 11th day of *July*, 1823, before *THROOP*, C. Judge.

On the trial, the counsel for the plaintiff introduced two notes, or memorandums in writing (the execution of which was admitted by defendant's counsel,) in the following words : (*First note*) " In the month of *June* next, we, jointly and severally, promise to pay *Simeon West* eighty-eight barrels good salt, in good barrels, well nailed, delivered at *Liverpool*, value received, *November 1st*, 1819, subject to duties." Signed "*Wm. Wentworth, Wm. H. Beach.*" (*Second note*) " In the month of *October* next, we, jointly and severally, promise to pay *Simeon West* eighty seven barrels good salt, in good barrels, well nailed, delivered at *Liverpool*, subject to duties, value received, *November 1st*, 1819." Signed "*Wm. Wentworth, Wm. H. Beach.*"

The counsel for the plaintiff then offered to prove the maximum price of salt between the times the notes became due and the time he demanded payment, to which the counsel for the defendants objected, contending that the plaintiff should be confined to the times the notes fell due in proving the value.

The Judge decided that the plaintiff was entitled to recover the maximum price of salt, between the times when the notes fell due, and the demand of payment by the plaintiff. The defendants, by their counsel, admitted that the salt was demanded on the 26th day of *October*, 1822, and that the price on that day was \$1,50 'per barrel ; that being the highest price between the times the notes fell due, and the time of the demand. The jury, under the charge of the Judge, found a verdict for the plaintiff for \$262,50 damages, being the value of the salt, at \$1,50 per barrel.

J. G. Forbes & B. D. Noxon, moved for a new trial, on the ground of misdirection as to the measure of damages ;

and cited *Davis v. Exrs. of Richardson*, (1 Bay's Rep. 105,) and *Dutch v. Warren*, (cited, and a short note of it given in Burr. 1010.

UTICA,
Aug. 1824.

West.
v.
Beach.

D. Kellogg, contra.

Curia, per SUTHERLAND, J. The measure of damages adopted at the Circuit was the true one. The case of *Cortelyou v. Lansing*. (2 Caines' Cas. Err. 216,) and of *Shepherd v. Johnson*. (2 East, 211) are precisely in point. The latter was an action upon a contract to replace a quantity of stock by a given day ; and it was held that the plaintiff was entitled to recover the highest value of the stock as it stood at the time of the trial ; and not its value on the day when it should have been delivered. *Grose, J.* says, " the true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of trial ; and it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action ; for it is his own fault that he does not perform his engagement at the time." *Cortelyou v. Lansing* was an action of assumpsit brought by the representatives of a pawnor against the pawnee of a depreciation note, which the pawnee had sold before application was made to redeem ; and it was held that the plaintiffs were entitled to recover the value of the note at the time of the application, and not at the time of the pledge. So in trover, if the chattel be not of a fixed and determinate value, its worth at the time of conversion is not the rule of damages ; but they may be enhanced according to the increased value of the chattel subsequent to that time. (*Fisher v. Prince*, 3 Burr. 1363. *Whitten v. Fuller*, 2 Bl. Rep. 902.)

New trial refused.

UTICA,
Aug. 1824.

Clarkson
v.
Carter.

CLARKSON against CARTER.

A dormant partner need not be named as plaintiff in assumpsit for goods sold, founded on a contract at the time of making which his interest was unknown to the defendant.

On releasing or selling his interest to his co-partner, he is a competent witness for the latter.

On a cash sale of goods, the vendee is not entitled to possession till he pays the price.

Rights of vendor and vendee in this respect considered, where earnest has or has not been paid.

ASSUMPSIT brought for a refusal by the defendant to receive and pay for 300 barrels of flour sold to him by the plaintiff. The cause was heard before three referees, September 24th, 1823, who reported for the plaintiff \$512,29 damages.

It was proved before the referees that one *Blood*, a broker, on the 20th October, 1821, sold to the defendant, at New-York, 300 barrels of *Petersburgh* flour, for the account of the plaintiff, at \$8 per barrel, of which he made a memorandum. The flour had not arrived at the time of the sale, but was daily expected. \$8 was then the fair market price.

Henry Ogden was offered and admitted as a witness, on the part of the plaintiff. Being objected to on account of his interest, he stated upon his *voir dire*, that when the flour was sold, he was jointly interested with the plaintiff in it; but sold out to him before this suit was brought, and had no interest whatever at the time of the hearing. He testified that he was absent at the time of the sale; but, on his return called upon the defendant, and offered him the flour. The defendant at first declined receiving it; but afterwards said he would take it, and pay the price agreed on; and directed that it should be sent to his store. The flour was placed on the dock, and was ready to be delivered; and the defendant told the plaintiff to send it to his store, and he would give him his (the defendant's check) for the price; but the plaintiff refused to have it removed till paid for. Not being paid for, it was not delivered; and was afterwards sold by *Crissons*, another broker, for \$6,50 per barrel; flour having declined to this price in the market. The report was for the difference between the price of the flour at \$8, and \$6,50, with the interest on that difference.

A motion was made to set aside the report.

P. A. Jay, for the plaintiff.

C. W. Sandford & C. Livingston, for the defendant.

UTICA,
Aug. 1824.

Clarkson
v.
Carter.

Curia, per SAVAGE, Ch. J. There are two questions arising in this cause :

1. Was *Ogden* a competent witness ; or ought he not to have been joined with the plaintiff ?

2. Was the plaintiff bound to deliver the flour before he was paid for it ?

Ogden seems to have been a dormant partner with the plaintiff ; but that fact was not known by the defendant at the time of the sale by *Blood*, the broker ; and the rule is well settled, that a dormant partner need not be joined in an action on a contract with a defendant who did not deal with him or know him in the transaction. (1 *Chit. Pl.* 7, 8. 2 *Exp. Rep.* 488. 2 *Taunt.* 324, 326.) *Ogden* was a competent witness, having no interest, and not being a party to the suit.

The next question is whether the plaintiff was bound to deliver the flour, without first receiving pay for it. This was a cash sale. The delivery and payment should be simultaneous acts. A person's check is no more payment than his note. He may have no funds in the bank on which he draws ; or, if he has, the bank may be justified in withholding payment.

In *Langfort v. Tiler*, (1 *Salk.* 113,) the defendant bought 81 tubs of tea, paid for and took away one, and paid £50 earnest. *Holt*, Ch. J. ruled that notwithstanding the earnest, the money must be paid upon fetching away the goods, no other time for payment being appointed ; that a demand without payment is void ; and that after earnest, the vendor cannot sell the goods to another without default in the vendee ; and if the vendee does not come and pay and take away the goods, the vendor ought to go and request him ; and then if the vendee does not come in convenient time, and pay and take away the goods, the agreement is dissolved, and he is at liberty to sell them to any other person.

UTICA,
Aug. 1824.
Williams
v.
Houghtaling.

In *Sands v. Taylor*, (5 John. Rep. 410, 11,) Kent, Ch. J. lays down a rule nearly similar, and adds, "It would be unreasonable to oblige him (the vendor) to let the article perish on his hands, and run the risk of the solvency of the buyer."

I am of opinion, therefore, that the motion must be denied, and that the plaintiff have judgment.

Motion denied.

WILLIAMS & OTHERS against HOUGHTALING & BEVIER.

Rule for casting interest where bond is payable by instalments, and the interest, though it runs from the date, is not demandable till the instalment falls due, and a payment is made on an instalment not due and payable.

COVENANT on the assignment of a bond executed by *Whigton & Thompson*, to the defendants, and by the latter assigned to the plaintiffs, with a covenant that \$1308.18 principal and interest, besides costs, were due at the time of the assignment, which was dated the 2d day of November, 1816. The bond assigned was dated March 31, 1803. The condition was, that if the obligors should pay to the obligees \$4250; viz. "\$750 on or before the 1st day of May, 1804; \$875 on or before the 1st day of May, 1805; \$875 on or before the 1st day of May, 1806; \$875 on or before the 1st day of May, 1807; and \$875 on or before the 1st day of May, 1808, with the interest, at 7 per cent. per annum, from the date on each and every payment of the above sum as they become due, then," &c.

On this bond were endorsements as follows: "Received, January 5th, 1804, of *Mahar Whigton and Robert Thompson, jun.* the sum of \$750, being the first payment on the obligation; and the interest due thereon. Received at the same time, \$20, on the 2d payment, on the within obligation. Received, June 1st, 1805, of *Robert Thompson, jun.* the sum of £369 18s. 7d. in full for principal and interest of the 2d payment on this obligation; and also received, the same day, £100 on the 3d payment in part thereof. Received, July 26, 1806, \$350. January 8, 1807, \$854. June 22d, 1811, \$300. May 23d, 1812, \$500. January 27,

1814, \$500. January 28, 1815, \$450. February 24, 1815, \$100,50."

UTICA,
Aug 1824

Williams
v.
Houghtaling.

Upon a case containing these facts, it was submitted upon what principle the interest should be calculated; and how the payments should be applied; and agreed that the Clerk should compute the interest according to the rule which the Court might direct; and that a cognovit should be given for the sum thus ascertained to be due.

Curia. When, according to the terms of a bond payable by instalments, interest cannot be demanded till the principal is payable (as in this case) payments made on an instalment not due and payable, should be applied to the extinguishment of principal, and such proportion of interest as has accrued on the principal so extinguished. For instance, an instalment on a bond of \$500 is due on the 1st January, 1825, with interest from the 1st January, 1824; on the 1st July, 1824, the obligor pays \$207: the \$7 should be applied to pay the 6 months interest accrued on \$200, and the \$200 extinguishes so much principal. If the whole be applied to the extinguishment of principal, no interest could be recovered upon the principal money extinguished; for interest ceases and is not due after its principal is paid. (*Tillotson v. Preston*, 3 *John. Rep.* 229.)

Rule accordingly.(a)

(a) *RULE for calculating INTEREST where partial payments have been made,*

The Judges of the Supreme Court, in answer to the question put to them as to the mode of calculating interest when sundry payments have been made, state that they do not know that the question has been judicially settled; but, according to their understanding, the rule of practice is, to calculate interest on the principal, up to the time when the payment has been made, add this interest to the principal, and then deduct the payment without regard to the time when made, whether before or after the expiration of the year. This rule, however, is to be adopted only in cases where the payment exceeds the interest due; otherwise it will be taking interest upon interest. When the payment falls short of the interest due, interest must be calculated on the principal up to the time when the payments will overrun the interest due on the principal debt; and the deduction then be made.

S. Thompson.

CASES IN THE SUPREME COURT

UTICA,
Aug. 1824.
Williams
v.
Houghtaling.

The above is taken from a written entry on a blank leaf in the printed book containing the general rules of this Court, kept by Mr. *Breeze*, the Clerk at *Utica*. Mr. *Breeze* does not remember when the entry was made, except that it was some time while the Hon. *Smith Thompson* was Chief Justice of this Court.

The principle adopted by the late Chancellor *Kent*, is laid down by him in nearly the same words. "The rule (says he) for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of the principal as aforesaid (*Connecticut v. Jackson*, 1 *John. Ch. Rep.* 17, 18. *Stoughton v. Lynch*, 2 *id.* 209, *S. P.*)

The same rule prevails in *Massachusetts*. (*Edes v. Goodridge*, 4 *Tyng's Mass. Rep.* 103. *Dean v. Williams*, 17 *Tyng's Mass. Rep.* 417, 418. *Fay v. Bradley et al.* 1 *Pickering's Mass. Rep.* 194.) In *Virginia*, (*Lighfoot v. Price*, 4 *Hen. & Munf.* 431.) *North Carolina*, (*Bunn v. Moore's Executors*, 1 *Hayw. Rep.* 279. *Anonymous*, 2 *id.* 17. *North & Prescott v. Mat-tell*, *id.* 151.) *Maryland*, (*Chapline v. Scott*, 4 *Harris & M'Henry's Rep.* 94.) *Kentucky*, (4 *Hall's Law Journal*, 122.) *South Carolina*, (*Administrators of Norwood ads. Manning*, 2 *Nott & M'Cord's Rep.* 395, 397.)

In *Connecticut*, the rule is the same, with the qualification that the first payment shall not be applied to the extinguishment of the interest, unless it be made at least one year from the time the interest began to run, nor as to subsequent payments, unless there be at least one year between them. (*General Rule*, *Kirby's Rep.* 49. *Kissam v. Burrall*, *id.* 326.) This is upon the ground that interest cannot be due except from year to year.

In *New-Jersey*, the rule is the same as in this state, with the difference that it disregards the amount of the payment which is applied to the extinguishment of the interest whenever paid, and whether less or more than the interest accrued. At least no distinction is made between these two cases, in *Meredith v. Banks*, (1 *Halstead's Rep.* 408,) where the rule is laid down.

In *Tracy v. Wolff*, (1 *Dal. Rep.* 124; *Pennsylvania*,) *M'Kean, C. J.* said, "The rule of computing interest must be such, that the interest of money paid in before the time, must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payments. For instance, a bond to pay £100 with annual interest at 6 per cent., and at the end of 6 months, £50 is paid in. This payment shall not be apportioned, £3 to the discharge of the half year's interest, and £47 to the diminution of the principal, so as to calculate the remaining interest at 6 per cent. on £53 for 6 months; but the interest shall be charged at the end of the year upon £100; the payment of £50 shall then be deducted from the aggregate sum of £106, and the obligor receive a cred-

it for £1. 10s as the interest of £50 for 6 months. In *Penrose v. Hart*, (id. 378.) *Shippen*, President, said, he remembered to have heard of an old decision, when *Logan* was Chief Justice, in which it was expressly settled, that money paid on account of a bond, should first be applied to discharge the interest due at the time of the payment; and the residue, if any, credited towards satisfaction of the principal; and this rule had been adopted as the uniform practice.

In *Lewis' executor v. Bacon's legatee and executors*, (3 *Hen. and Munf. Virginia Rep.* 89,) where a creditor kept an account current with his debtor, and also an interest account, in which he charged interest on the several items of debit to a particular period, and gave credit by interest on the several payments to the same period, and charged in the account current the balance appearing on the interest account, and a balance being then struck, interest was again charged on the balance thus consisting of principal and interest, the Court held it to be compound interest, and not allowable.

UTICA.
Aug. 1824.
Jackson
v.
Collins.

JACKSON, ex dem. SCOFIELD, against COLLINS.

EJECTMENT, tried at the *Monroe Circuit*, before (the late) Mr. Justice **PLATT**, on the 4th day of *July*, 1822, for lots number 61, 62, and the north half of 63, situate in the village of *Rochester*.

The demise in the declaration was laid on the 14th day of *March*, 1822. On the trial, the lessors of the plaintiff showed the following title: 1. A deed duly acknowledged and proved, dated the 2d day *January*, 1818, from *N. Rochester. C. Carroll*, and *William Fitzburgh*, to *William Robb*, for lots number 61, 62 and 63, in the village of *Rochester*. The deed was executed by *N. Rochester*, for himself, and for *Carroll* and *Fitzburgh*, by *N. Rochester*, their attorney. 2. An exemplification of a judgment in the Supreme Court, in favour of *Jonathan R. Hale*, against *Robb*, for \$483,62,

In ejectment, an objection cannot be made at the bar that the plaintiff failed at the trial to make out a title, unless such objection was previously made at the trial.

One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser

under an execution upon the judgment.

A deputy sheriff may complete an execution by sale and conveyance, after the sheriff goes out of office, provided the execution was levied before.

A deputy sheriff who is plaintiff in, or assignee of a judgment, may purchase under an execution thereon directed to his principal.

In construing a statute, wherever the intention of the legislature can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute.

Cases illustrating this proposition referred to by the plaintiff's counsel.

UTICA,
Aug. 1824.

Jackson
v.
Collins.

filed *August 30th*, 1819, and an *alias testatum fi. fa.* on this judgment, directed to the Sheriff of the county of *Genessee*, tested *August*, and returnable *October* term, 1820. It was then proved on the part of the plaintiff, that the above lots 61, 62, and the north half of 63, were sold by virtue of the execution, by *Oliver Lee*, a Deputy Sheriff, on the *4th* day of *October*, 1820, to *Ralph Wadhams*, for \$535.50, being the full amount of the execution and Sheriff's costs, and it was further proved, that at the time of the sale. *Lee* gave to *Wadhams* a certificate that, at the expiration of 15 months, he would be entitled to a deed. The plaintiff then produced a deed duly proved, dated the *9th* day of *February*, 1822, of the above premises, from *Parmenio Adams*, late Sheriff of the county of *Genessee*, by *Oliver Lee*, deputy, to *Ralph Wadhams*, the purchaser, for the consideration of \$535.50 ; and a quit-claim deed, duly proved, from *Wadhams* to *Scofield*, the lessor, dated the *18th* day of *February*, 1822, for the consideration of 600 dollars. It was also proved by the plaintiff, that the defendant, at the time of the demise in the declaration, and at the time of trial, was in possession of the premises, and that he confessed that he rented the premises of one *Harvey Montgomery* ; and that *Montgomery*, four or five years since, said that he had the premises in question, of *Robb*, from whom the lessor of the plaintiff claimed title.

It appeared that the defendant was in possession of the premises under *Montgomery*, at the date of the deed from *Wadhams*, to the lessor of the plaintiff ; that *Lee*, at the time he sold the premises, was a Deputy Sheriff ; that *Adams*, the Sheriff, went out of office in the winter of 1821, about a year previous to the date of the deed given by *Lee*, in the name of the Sheriff to *Wadhams*.

Lee, the Deputy Sheriff, was then called as a witness by the defendant. He stated that *Scofield*, the lessor, handed him the execution in favour of *Hale*, against *Robb*, and directed him to sell the premises in question, stating, at the same time, that he had bought the judgment of *Hale* ; that at the time he sold the premises, he informed the by-stand-

ers the amount of the execution, and the sum he wished to raise, and that there were several bids from different persons; that *Wadhams*, to whom it was sold, overbid the rest. The witness further stated, that the purchase money was not paid by *Wadhams*, at the time of the sale; that, in a conversation between the lessor of the plaintiff and *Wadhams*, after the sale, *Scotfield*, the lessor, offered to take *Wadhams*'s note; witness saw *Scotfield* and *Wadhams* sit down at a table to write, but did not see *Wadhams* deliver the note to *Scotfield*; that at the time they were writing the note, the witness left the room. Soon after, *Scotfield*, the lessor, as assignee of *Hale*, receipted the execution in full. It appeared that *Scotfield*, at the time the premises were sold, was a Deputy Sheriff of the county of *Genesee*.

UTICA,
Aug. 1824.

Jackson
v.
Collins.

From the above facts, it was contended by the defendant, 1. That *Wadhams* was the trustee of *Scotfield*, and purchased the land for his benefit. 2. That the purchase was void, *Scotfield* being a deputy at the time. 3. That the deed given by *Lee*, the deputy, after *Adams*, the Sheriff, went out of office, was void; and 4. That if *Wadhams* was not the trustee of *Scotfield*, there was an adverse possession on the 18th day of February, 1822, at the date of *Wadhams*' deed to *Scotfield*, the lessor.

A verdict was taken for the plaintiff, subject to the opinion of the Court on the above case.

H. D. Mason & J. C. Spencer, for the plaintiff. The 16th section of the act concerning judgments and executions, (a) is general, and forbids a Sheriff to whom an execution is directed, and his deputies, from purchasing; but this must mean the officer acting in the sale, or to whom the process is delivered. If not so, then a deputy having a judgment, cannot adopt the only effectual means of getting his money, that of bidding under the execution; for, in such a case, the execution cannot go to the coroner. It goes to him only when the Sheriff is interested. (b) "Such a construction ought to be put on a statute as may best answer the intention which the makers had in view; and this intention is sometimes to be collected from the case or necessity of ma-

(a) 1 R. L. 506.

(b) *Done v. Smethier*, Cr. Car. 416.

UTICA,
Aug. 1824.

Jackson
v.
Collins.

king the statute, and sometimes from other circumstances, and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute; and a thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers." These propositions are sustained and illustrated by various English cases of construction upon statutes where the Courts have departed from the letter in order to reach the spirit and intent of the act. (*Reniger v. Foggassa*, Plowd. 18. *Straunge v. Croker*, id. 88. 2 *Inst.* 64. *The King v. Younger*, 5 T. R. 449. *Margate Pier Co. v. Hannani*, 3 B. & A. 266. *Edwards v. Deck*, 4 id. 212, per *Holroyd, J.*

Here was not an adverse possession in the defendant at the time of *Wadham's* conveyance to *Scotfield*. If the former was the trustee of the latter, as insisted by one of the defendant's points, and which we concede, of course, adverse possession is out of the question. But, proceeding upon the ground that *Wadhams* purchased for his own benefit, we deny that there was such an adverse possession as prevented his conveying to *Scotfield*. The defendant, *Collins*, held under *Montgomery*, who purchased of *Robb*, the defendant in the judgment and execution. Both *Montgomery* and *Collins* were quasi the tenants of the purchaser.(c)

(c) *Jackson v. Sternburgh*, 1 *John. Cas.* 155. Same v. *Graham*, 3 *Caines' Rep.* 188. Same v. *Bush*, 10 *John. Cas.* 223.
(d) 10 *John. Cas.* 223.

Lee had a right to convey, though his principal had gone out of office. The sale was complete on the 14th October, 1820. The Sheriff had obeyed the execution; and all that remained was to give the evidence of the sale, if the property should not be redeemed. In *Jackson v. Bush*,(d) the Court say, "A sale, and the consummation of that sale by a deed, are acts which the Sheriff may do by deputy. The law does not require them to be done by the Sheriff in person." Here no distinction is made between the deputy of a Sheriff out of office, or one in. The case, indeed, did not call for it; but as far as it goes, it shows that the deputy may do whatever the Sheriff can. *Lee* was proved to be a general deputy.(e) Execution being an entire thing, he

(e) *Jackson v. Davis*, 18 *John. Cas.* 10.

who begins must end it, and therefore, if a Sheriff seize goods, and is removed, yet he is to proceed in the sale. (f) The authority of the principal, therefore, continued; (g) and an authority from him to the deputy being indefinite in time is not revoked unless it be countermanded, or cease by the death of the principal or agent. (h) The appointment of a deputy is so long as the principal shall be Sheriff, or have any thing to do as Sheriff; and if he may execute process after he is out of office, he does this as Sheriff. So far has this doctrine been carried, that on the renewal of a Sheriff's commission under the old constitution, no new appointment of an Under Sheriff was necessary; neither need his bond be renewed; but he continued Under Sheriff, and his bond continued in full force. (i) Dalton, in his treatise on the office of Sheriff, (j) calls the Under Sheriff (who answers to our deputy) the attorney of the Sheriff; and that he may be appointed at will, and revoked as an attorney may be. Why may not a removed Sheriff appoint an attorney to do that which the principal is authorized to perform? And what is the difference whether the appointment be before or after his removal?

No objection to Robb's title was taken at the trial. It is too late to raise it now. But it is unfounded in point of fact. Rochester's authority to execute the deed, was not questioned at the trial. Besides, Montgomery claimed under Robb. (k)

W. C. Van Ness & J. A. Collier, for the defendant. No title is shewn in the lessor of the plaintiff. Even a *prima facie* case was not made; and this is not one of that class of objections from which we are precluded by having omitted to make it at the trial. The objection goes to the merits; there is a defect in the title; and the defendant shall not be precluded from urging it merely because other objections were made at the trial. (l)

The Deputy Sheriff had no power to execute a deed after the Sheriff, his principal, was removed from office. We can find no adjudged case upon this subject, but contend that af-

UTICA,
Aug. 1824.
Jackson
v.
Collins.

(f) *Dall. Shff.* 19. *Salk.* 323. *Cro. Jac.* 73. *Devoe v. Elliott,* 2 *Caines' Rep.* 243.
(g) *Bac. Ab. Sheriff* (J) *Hempstead v. Weed,* 20 *John.* 64.
(h) *C6. Litt.* 52, b. *Bac. Ab. authority,* (E)
(i) *Hughes v. Smith,* 6 *John. Rep.* 168.
(j) 456.

(k) *Jackson v. Scott,* 18 *John.* 94.

(l) *Palmer v. Lorrillard,* 16 *John.* 318, 353, per Woodworth, J. in 18 *John.* 564.

UTICA,
Aug. 1824.

Jackson
v.
Collins.

ter the Sheriff is removed from office, the power of his deputy is, *ipso facto*, at an end ; and that, at all events, no one can thereafter act without *new* and *special* authority from the Sheriff. He and his sureties would not be bound for the misconduct of his deputy after the expiration of his term of office. Suppose the deputy should sell the goods of a stranger, after the Sheriff's term of office had expired ; would he be liable for this act of his *late* deputy ? Previous to the redemption act, (as it is called) suppose the *late* deputy of a *late* Sheriff should have given a *deed*, without any previous levy or sale—nothing more need be shewn than the judgment, execution and Sheriff's deed, to entitle the plaintiff to recover. Would such a deed from the *late* deputy be sufficient, then, to authorize a judgment against the defendant in possession ? There is *no responsibility* resting upon the *late* deputy. He acts under no oath of office. His *own sureties* would not be bound beyond the period of the Sheriff's term, and neither the Sheriff nor his *sureties* for any act after this period. The authority of an agent or attorney ceases upon the death of his principal. Does not the power and authority of a deputy also cease, upon the *political death* of the Sheriff ?

The defendant, (or *Montgomery*) was in possession, claiming adversely, at the date of the deed to the lessor of the plaintiff. The defendant had *rented* the premises of *Montgomery*, and neither of them acknowledged any subsisting interest in *Robb*. The defendant claimed to hold under his lease, and *Montgomery*, who said he *had* the premises of *Robb*, claimed and exercised the right of leasing the premises to the defendant, without the privity or consent of *Robb* or any other person ; and the defendant was in possession under the lease.

Curia, per SAVAGE, Ch. J. It is objected, 1, that no title was shown in *Robb* subsequent to the judgment. Title was in *Robb* the 2d January, 1818, and judgment August 30th, 1819. The presumption is, therefore, in the absence of all proof to the contrary, that it continued in him during the intermediate time. Besides, had the objection been taken at the trial, that fact might have been shown.

2. It is objected that *Lee*, as deputy to *Adams*, had no right to execute a deed after *Adams* was out of office, *Lee* being no longer deputy. It is not denied that during *Adams'* continuance in office, the deputy had authority to do any act which his principal could do in his official capacity, except the appointment of deputies, (and *vid. Parker v. Kett*, 1 *Ld. Raym.* 659, and *S. C. 1 Salk.* 95.) But it is contended that the authority of the deputy ceased when the new Sheriff had taken the office upon him. In my opinion, the authority of the deputy is limited by the duration of the authority of his principal. An execution against the property of a defendant, partly executed by the old Sheriff, shall be completed by him, and in relation to any such execution in the Sheriff's hands, when he goes out of office, he continues Sheriff, and may act by deputy, as if he was still in office. He is in office *quoad hoc*, and the acts of a deputy in relation to such an execution are the acts of the Sheriff himself. Even in the case of a *ca. sa.* upon which the defendant has been arrested, and is imprisoned, it is optional with the old Sheriff whether he will transfer the prisoner to the new Sheriff. The old Sheriff has a right to retain the custody of the prisoner, and complete the execution of the writ. (*Hempstead v. Weed*, 20 *John.* 64.)

UTICA,
Aug. 1824.
—
Jackson
v.
Collins.

3. There was no adverse possession shewn, to defeat the operation of the deed, either from the Sheriff to *Wadhams*, or from *Wadhams* to the lessor of the plaintiff.

4. It is made a point, that *Wadhams* was a mere trustee for *Scofield*, and that he, being a deputy of the Sheriff at the time of the sale, was prohibited by statute from purchasing. The statute is, "that it shall not be lawful for any Sheriff, or other officer, to whom any such execution shall be directed, or any of their deputies, or any person for them or either of them, to purchase any goods or chattels, lands or tenements, at any sale, by virtue of any execution, and all purchases so made by them, or any of them, or for the use of them, or any of them, shall be void." Admitting, as the plaintiff does, that *Wadhams* purchased for the use of *Scofield*, the purchase comes within the letter of the act, but it could never have been the intention of the legislature to have prevented a Deputy Sheriff, when plaintiff in an execution, from bidding, in

UTICA.
Aug. 1834.
Griswold
v.
National
Insurance
Company.

order to secure his money. The object was to prevent abuse—that the Sheriff or his deputies should not be allowed to become purchasers at their own sales, and thereby be induced to conduct corruptly in relation to them. But surely it was never intended to place those persons in a worse situation than others, as to the collection of their own demands. “Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute.” (*Bac. Ab. tit. Statute, (I) 15 John. 380, per Ch. J. Thompson.*) A thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers. This proposition is fully established and illustrated by the cases cited on the part of the plaintiff.

I am, therefore, of opinion, that *Scofield* had a right to bid and purchase, *bona fide*, as we are to presume he did in this case; for fraud, of any kind, is not imputed. The plaintiff is accordingly entitled to judgment.

Judgment for the plaintiff.

GRISWOLD and GRISWOLD against THE NATIONAL INSURANCE COMPANY of the city of NEW-YORK.

On demurrer, the party who commits the first substan-

ASSUMPSIT. The first count of the declaration was upon a policy of insurance on the ship *William*, dated August first substantial fault in pleading, shall have judgment against him.

A plea which is bad in substance is not aided by a replication.

In declaring upon a contract, which is sufficiently stated in the first count, it need not be repeated in the subsequent counts of the same declaration; but it is enough to declare that it is the same as is set forth in the first count; and per *Woodworth, J.* interrupting *Wells*, counsel, S. P.

Thus, where the plaintiff declared upon a policy of insurance, setting it out in the first count, and in the subsequent counts declared as upon another policy, “for the same voyage, and upon the same subject matter, and upon the same terms and stipulations, and containing therein to the same effect as in the said policy of insurance in the said first count mentioned, &c.” *held*, that the subsequent counts were good.

Form of pleading a survey upon a vessel, according to the rotten clause in a policy of insurance. *Note (a).*

Such a survey is properly made within a reasonable time after the vessel's arrival at her port of destination—it need not be made before.

21st, 1819, at and from *New-York* to *Cadiz*, averring that the ship sailed on the voyage insured, and alleging her physical total loss, and that the ship became of no use or value, by perils of the sea. The second count set forth another policy upon the same vessel and voyage, in the same terms as the policy described in the first count, and averred the loss to be a technical total one, as amounting to more than a moiety of the ship. The third count was the same as the second, superadding a general average loss by a jettison. The fourth was the usual money counts, consolidated in one. The policy, as set forth in each count, contained the usual rotten clause, "that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound, or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers should not be bound to pay their subscription on that policy." The policy in the second and third counts was set forth thus: "For the same voyage, and upon the same subject matter of insurance, and upon the same terms and stipulations, and containing therein to the same effect as in the said policy of insurance in the said first count of this declaration is above mentioned," &c.

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

In pleading such a survey, the defendant need not state the particular manner and circumstances of the survey, but merely that it was regular—circumstances of impeachment come more properly from the assured, if he have a right to impeach the survey at all, as to which, *Quere*.

An averment that the ship was by such survey declared unseaworthy, by reason of being rotten, is sufficient, within the rotten clause;

But an averment that the ship was found by the survey to be in a very *bad* and rotten condition, is not good. It implies a mixed cause of unseaworthiness; whereas, to make a survey a flat bar within the rotten clause, it should appear plainly that the unseaworthiness arose from *rottenness* solely.

Matter which comes more properly from the plaintiff, need not be stated in the plea.

A survey is always made at the instance, and for the benefit of the owner or master of the vessel, and goes, of course, into his hands. The assurers are not parties to the survey. It is proper, but not indispensable, for a survey to state the particulars of the decay.

The plea stated a survey made at *Cadiz*, and the replication traversed that the survey was made at *Cadiz* or *elsewhere*; held bad on special demurrer.

The issue must be as broad as the traverse, and a rejoinder to such a replication would be a departure.

Declaration, averring a physical total loss of a ship: plea, a survey at *Cadiz*, the port of destination: replication, a different survey at *Cadiz*, and traversing the survey in the plea: held, a departure; for the ship arriving at her port of destination, there could not be a physical total loss.

UTICA,
Aug. 1824.

Griswold

v.
National
Insurance
Company.

Pleas : To the 1st, 2d and 4th counts, the general issue— to the 1st and 2d counts, a regular survey on the vessel, upon and immediately after her arrival at *Cadiz*, to wit, on the 15th *October*, 1819, on which she was declared unseaworthy, by reason of her being rotten: (a) to the 1st count, alone, a regular survey on the vessel, upon and immediately after her arrival at *Cadiz*, to wit, on the 15th *October*, 1819, by which she was found to be in a very bad and rotten condition, and that, to make her seaworthy would amount to \$5000 or upwards, according to the report of *Thomas Hill*, one of the surveyors, a ship-carpenter of that port, and in which the surveyors coincided, and that it was their firm opinion it would be best for all parties concerned in the ship, that she should be condemned: to the 2d count, alone, the same, omitting the report of the ship-carpenter: to the 3d count non-assumpsit, as to the general average, and as to the residue a survey in the same form as the last mentioned plea to the 2d count.

(a) This plea was as follows :

"And for a further plea in this behalf, as to the said 1st and 2d counts of the said declaration, the said *The National Insurance Company in the city of New-York*, by leave, &c. say, that the said *Nathaniel L. Griswold* and *George Griswold* ought not to have or maintain their aforesaid action thereof, against them, in respect of the matters contained in the aforesaid 1st and 2d counts of the aforesaid declaration, or in either of them, because they, the said *The National Insurance Company in the city of New York*, say, that the said ship *William*, mentioned in the said 1st and 2d counts, did, in the due prosecution of the voyage described in the policy of insurance set forth and contained in the said 1st count, and referred to and intended in and by the said 2d count of the said declaration, arrive at *Cadiz*, in the said policy mentioned, and upon and immediately after the arrival of the said ship there, in the course of the said voyage, and in reference to the said voyage, and to any damage which the said ship had sustained in the prosecution thereof, a regular survey was had upon the said ship, at *Cadiz*, aforesaid, to wit, at the city of *New York*, and in the county of *New-York* aforesaid, on the 15th day of *October*, A. D. 1819, upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten, and this the said *The National Insurance Company in the city of New-York*, are ready to verify. Wherefore, they pray judgment, if the said *Nathaniel L. Griswold* and *George Griswold*, their action aforesaid thereof against them, ought to have or maintain in respect of the matters contained in the aforesaid 1st and 2d counts of the aforesaid declaration, or either of them.

Replication, to the 2d plea, which covered the 1st and 2d counts, that the ship arrived at *Cadiz*, *September 25th*, 1819; and after the expiration of at least 15 days, to wit, on the 11th of *October*, 1819, a survey on the vessel, by which it was found that the stern frame had apparently worked, the wood- ing ends under the counter open, and the ship making a great deal of water; that after the expiration of at least 19 days, and not sooner, to wit, on the 15th of *October*, 1819, a second survey, supplemental to the first, to ascertain the expense of the repairs reported by the first survey, by which survey it was found as stated in the third plea, with an averment that the second survey is the same as the one mentioned in the second plea; that this survey was not ordered by a Court of Admiralty, or other competent jurisdiction; that the surveyors were not sworn according to maritime law and usage; that it was not a regular survey within the policy; and concluded with a formal traverse, that this survey, or any other had upon the ship at *Cadiz*, or elsewhere, found the vessel unseaworthy by reason of her being rotten in manner and form, &c.; to the 3d plea the same, omitting the traverse; to the 4th plea the same, except concluding with a traverse that the survey mentioned in the 4th plea was of any other tenor and effect than in the replication set out; to the residue of the 5th plea, the same as to the 4th.

Special demurrer to each of the replications, assigning the following causes:

I. To the replication to the 2d plea:

1. The traverse seeks to put in issue matters not in the plea.
2. It is double and multifarious.
3. No apt and proper issue can be taken upon the traverse.
4. The traverse tenders an issue upon matters contained in the inducement.
5. In other respects double, uncertain, &c.

II. To the replication to the 3d plea:

1. It does not traverse or avoid the matters contained in the plea, except by inference and legal construction.
2. It is evasive, uncertain, not issuable, and argumentative, in alleging that the surveys were made, one at

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

CASES IN THE SUPREME COURT

UTICA;
Aug. 1824:

Griswold
v.
National
Insurance
Company

least 15, and the other at least 19 days after the arrival of the ship.

3. It is double and multifarious, seeking to put in issue distinct and independent facts, thus : 1. That the second survey was not had by the order of a Court of Admiralty, or other competent authority. 2. Surveyors not sworn. 3. Not a regular survey, within the meaning of the policy. 4. That there was another survey of *October 11th*. 5. That the one of the *15th* was supplemental to the other.

4. In other respects double, uncertain, &c.

III. To the replication to the 4th plea :

1. The traverse seeks to put in issue the matters contained in the inducement.
2. It contains only matter of legal inference and construction, arising out of the inducement.
3. No apt or proper issue can be taken on it.
4. It is in other respects uncertain, &c.

IV. To the replication to the residue of the fifth plea, the same causes as to the replication to the fourth plea.

Joinder in demurrer to each separately.

The cause was argued at *May* term, 1823, by (the late) Mr. *J. Wells*, for the defendants, in support of the demurrers, and *G. Griffin & T. A. Emmet*, for the plaintiffs.

J. Wells, in support of the demurrers. The pleadings in question all turn upon the rotten clause in the policy. The second plea sets forth the survey according to its legal effect, and the traverse is to a matter not alleged in the plea. The averment is of a survey at *Cadiz*, on the *15th* of *October*. The traverse does not deny this, but says merely that neither by that, nor any other survey, was it found, &c. This is travelling out of the plea, which speaks of but one survey. A traverse of matter not in the plea is bad. (*Killigrew v. Sawyer*, 2 Ventr. 79. *Gwinne v. Poole*, 2 Lutw. 1065. *Talbot v. Woodhouse*, id. 1480. *Humphreys v. Churchman*, Cas. Temp. Hardw. 275.) This traverse is moreover double. It speaks not only of the survey set forth, but of any other

survey. The rule is, that the issue must be as broad as the traverse ; and what kind of an issue would this give us ? It would be an affirmative on our part, that there was such a survey on the 15th of October, or some other survey. We had no choice but to rejoin in this manner. Going down to the Circuit, upon such an issue, would be a mis-trial. (1 Chit. Pl. 519, 520.)

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

The replication to the third plea omits the traverse, and is, therefore, the more defective. It contains mere matter of inducement, which cannot be traversed. (1 Chit. Pl. 596.) Again: the object is to impeach our survey. The replication attempts to do this by setting out another survey, and showing the defects which exist in ours. Thus it contains, in itself, several distinct and independent matters, not all leading to a single point ; and is defective in this particular. You may state as many matters as you please, by way of inducement, if you make them all converge to one point ; but you cannot set up a variety of matters independent of each other, and leave them there. They must be connected, and made to constitute a single whole. (1 Chit. Pl. 512, 577, and the cases there cited. *Patcher v. Sprague*, 2 John. Rep. 462. *Cooper v. Heermance*, 3 id. 315.) The last case is in point. In replying *per fraudem* to a plea of an insolvent discharge, the plaintiff set up distinctly every species of fraud recognized by the insolvent act, constituting as many distinct points of defence. This was holden ill. The replication is also defective, in averring that the second survey was supplemental to the first. *Brandegge v. The National Insurance Company*, (20 John. 328) makes the survey conclusive. It must be judged of by itself, and the pleadings should relate directly to it. It is uncertain and argumentative in its attack upon the survey. The effect of similar language is considered in *Pullen v. Benson*, (2 Salk. 628.) The same objection applies to the part which speaks of time, viz. *after the expiration of 19 days, and not sooner*, in reply to our plea that the survey took place immediately. Besides, it tenders, in this respect, an issue on time, which is immaterial. (*Rogers v. Burk*, 10 John. 400.)

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

The traverse in the replication to the 4th. and the *residue* of the 5th plea, seeks to put in issue matter contained in the inducement, which is not traverseable. It concludes that the survey mentioned in our pleas was not of any other tenor or effect than as in the replication set forth, which draws into inquiry the whole matter stated by way of inducement. (1 *Chit. Pl.* 596. *Com. Dig. Pleader*, (G. 18, 20).)

All these replications are bad, as containing a negative pregnant, (2 *Saund.* 314, 319, *n.* 6) beside being argumentative. Instances of bad traverses, for this latter reason, will be found in *Goddard v. Thornton*, (*Yelv.* 170) *Roy v. Kilderley*, (*Sid.* 427.) The same subject is also considered in *Fanshaw v. Morrison*, (2 *Salk.* 520) and *Snider v. Croy*, (2 *John. Rep.* 227.)

Again: the qualifications of this survey, insisted on by the plea, are mere matters of legal inference; and the replication is, therefore, bad. (1 *Saund.* 23, *n.* (5). 2 *id.* 159, *a. n.* (10). *id.* 161, *n.* (11).) The replications should be confined to mere matters of fact.

Nor are we to be prejudiced by our admissions. A demurrer does not make a replication good, because its truth is admitted by this form of taking advantage of its defects: No facts are admitted by a demurrer, except such as are well and sufficiently pleaded. (*Co. Litt.* 72, *a.*)

The idea of these replications is probably taken from *Condy's Marshall*, 159, *a. note* (15); but it is no objection to the survey that it was not taken under the order of a Court of Admiralty. It is not the practice to procure such an order, and there cannot be a more dangerous principle than the one contended for. It is upon surveys of this description that vessels are to be sold, the assured entitled to abandon, or the assurer to defend under the rotten clause. In many cases, the sanction of a Court of Admiralty cannot possibly be procured. Suppose, as is every day the case, a vessel is driven into a port where there is no Court of Admiralty: must you then seek out the next nearest Court? It is, perhaps, well enough, and may be necessary, where there is a Court of Admiralty, that its sanction should be procured; but the pleader who wishes to avoid the survey, because this

formality is omitted, should, at least, shew that there is a Court of Admiralty at the port where the survey takes place. The replication here assumes the broad ground, that a survey is void, in all cases, unless done under the authority of that Court. The practice is otherwise. This business is generally done under the order of our consuls; if there be no consul, under that of the magistrates of the place; and if there be no magistrates, then by discreet men. Not a single survey was ever made in this city, under the orders of a Court of Admiralty, though that Court is always open here. It is usually made through the wardens of the port. According to the replication, we have been in an error on this head ever since the establishment of the government. But this question was considered in *Dorr v. The Pacifick Insurance Company*, (7 Wheat. 581) and it was said by Judge Johnson, that "every commercial country has its own regulations on the subject of surveys. It is properly a subject of Admiralty jurisdiction; since mariners and freighters have to claim the aid of the Admiralty to release them from their contract, in cases of a defect of seaworthiness. A regular survey must, therefore, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be." This survey, then, like every other, must be presumed regular, until the contrary is shewn. Allow that it must be made according to the usage and custom of the port where it is taken, still the plea, which would impeach it, should shew that it was not taken in conformity to the custom.

But the replications defeat themselves. They show that the 2d survey was supplemental to the first, and was made by the same persons who made the first. Hence, as the survey first set out is regular, it follows that the second was so. The first must be considered regular, because every pleading is to be taken most strongly against the pleader. (1 Saund. 259, n. (8). *De Symonds v. Shedden*, 2 B. & P. 155.) In point of practice, nothing is more usual than two or three surveys, before the operation is complete. In the case of *Dorr v. The Pacifick Insurance Company*, the survey acted upon and recognized was a second one. Again: what issue could we

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

take upon this part of the replication, which says that it is not a survey, within the true intent and meaning of the policy. Matter of law is pleaded, instead of fact, and the case of *Kidder v. West*, (3 Lev. 167) is in point.

What is the effect of the survey of the 11th of October? It states that the stern frame had apparently worked, the wooding ends under the counter open, and the ship making a great deal of water. The language shews that it was merely an incipient survey, to be completed at another day. Accordingly, a few days after, a further survey is made. There is nothing inconsistent between the two; but both constitute one only. The looseness of the stern frame, &c. are merely stated as the effects of the rottenness, so that the vessel is condemned for this cause, the *casus fœderis*, between the parties. It matters not what was the result of the first survey, if the final condemnation was for rottenness. (*Garrigues v. Coxe*, 1 Bin. 592. *Armroyd v. The Union Insurance Company*, 2 id. 394. *Steinmets v. The U. S. Insurance Company*, 2 Serg. & Rawle's Rep. 293. *Haft v. The Marine Insurance Company*, 8 John. 163. *Dorr v. The Pacific Insurance Company*, 7 Wheat. 581.) A mixed cause of condemnation is quite another thing.

The effect of a survey is given in *Brandegee v. The National Insurance Company*, (20 John. 328.) and the cases there cited. When the loss arises from rottenness, and this fact appears by the survey, this survey is in itself a bar to the action. It is, therefore, the proper subject of a plea, and not of evidence merely. It may better be put to the Court by way of plea, which is a shorter and more direct mode of determining the question.

The replication to the 2d plea is bad even on general demurrer. The first count of the declaration avers a physical total loss. We plead the arrival of the vessel and the survey. The replication then varies from that count. It admits that the vessel arrived and sets forth a technical total loss. The replication should support or enlarge upon the declaration. (2 Saund. 84, a. Co. Litt. 304, a. *Allen v. Watson*, 16 John. 205. *Andrus v. Waring*, 20 John. 163,

Archbold, 247.) It is unnecessary to quote authorities to shew that a departure is bad on general demurrer.

The declaration is also defective. The 2d and 3d counts set forth the policy by reference merely to the 1st. This may have the authority of *Chitty*, but is not warranted by any direct adjudication. *Phillips v. Fielding*, (2 H. Bl. 131) supports this objection.

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

[WOODWORTH, J. I think you will find this form of declaring supported by *Crookshank v. Gray et ux.* (20 John. 344.)]

G. Girffin & T. A. Emmet, contra. The party committing the first fault in pleading must have judgment against him. (*Woodward v. Robinson*, 1 Str. 302, 303. *Com. Dig. Pleader*, M. 2.) The 2d and 3d counts are good by way of reference. Why should a long policy be reiterated in each count? This would be against the policy of our jurisprudence, which abridges pleadings and other proceedings as far as possible, with the view to a saving of expense. This form is according to the practice of the best pleaders among the profession.

This survey is set up as a flat bar; thus shutting out all inquiry as to its merits, and making it conclusive. It is then incumbent on the defendant to shew clearly that it is within the rotten clause. There are but three cases extant in which this survey is holden a bar.

1. The survey is alleged to have been made after the voyage had ended. This voyage was at and from *New-York to Cadiz*. The averments as to time are the same in all the pleas. This differs, therefore, from the cases of *Brandege v. The National Insurance Company*, (20 John. 328.) *Steinmets v. The U. S. Insurance Company*, (2 Serg. & Rawle's Rep. 293,) and *Dorr v. The Pacific Insurance Company*. (7 Wheat. 581.) To be a bar, the survey must be within the clause, which contemplates one pending the voyage. Without this clause, the survey would have been mere preliminary proof. [The counsel read the usual rotten clause from a printed policy.] It means a survey while the ship is sailing,

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company,

or in some port of necessity ; not that the underwriter shall be discharged because the vessel is unseaworthy as to some other voyage, but as to the very voyage. "The vessel may be condemned for a variety of reasons, which imply nothing against her seaworthiness when the risk commenced ; but if she be condemned as being *unsound* or *rotten*, this can so seldom occur unless she was so when she started, that the parties are willing to consider this circumstance, if established by regular survey and condemnation, as evidence of the fact of want of sea-worthiness, when she sailed, without going into other proof which it is always difficult to procure." (*Condy's Marshall*, 159 b. n.(15). In construing a clause which is to bar us, the Court will not extend it by implication.

The object, as between the assurers and the assured, is always the state of the vessel, not at the end, but during the voyage. The word *immediately* has no legal meaning, and the pleas may be read *upon and after the vessel's arrival*. Every vessel has a point of time, at which it passes from a sperate to a desperate state, or arrives at a situation of unseaworthiness. Who shall undertake to say that the unseaworthiness did not attach after the arrival ? Can a court of justice judicially say so ? If you depart from the construction for which we contend, that it must be during the voyage, where will you stop as to the time of survey ? At one day or one year after the arrival of the ship ? To strengthen this construction still further, look at other parts of the policy. The company takes upon itself to bear certain perils in *this voyage*, which may, by construction, be extended to and reiterated in every clause. The reason for its insertion is evident. To make a policy attach, the ship must be seaworthy at the point of starting. It being difficult to determine this, the policy adds another precaution, viz. that a future survey finding unseaworthiness shall be evidence of original rottenness. When a ship arrives at her port of destination, the precaution ceases to be necessary. The voyage is finished. It does not appear how long after the arrival the survey was had.

2. The manner of the survey is not set forth. The words of the rotten clause are, that if, *on a regular survey, &c.* To

say that a survey was made, is not enough; but the party should set forth the manner and circumstances under which it was made. In this particular, the pleas vary from those in the cases cited to support them. Facts should be shewn to enable the Court to judge whether the survey be regular or not. Instead of finding fault with the manner in which we deny the necessary circumstances, and impeach the survey at Cadiz as disagreeing with usage, the *onus* lies upon the defendants, who must shew affirmatively that it is agreeable to usage. The survey is a judicial act, and should be performed under the direction of a Court of Admiralty, unless this is excused by the absence of such a Court from the port of survey. If not done through the instrumentality of such a Court, it lies with the defendant to shew the reason, in order to give a survey the effect of a pleaded bar. It was decided in *Robinson v. Clifford*, (*Condy's Marshall*, 159, *a. note*) that a warrant of survey and report is a judicial proceeding. Now, a party relying on a judicial proceeding, is bound to set it out particularly. The words *regularly* and *truly*, &c. will not do. (*Com. Dig. Pleader*, (E. 18.) *Cruger v. Cropsey*, 3 *John. Rep.* 242. *Curry v. Henry*, 2 *John. Rep.* 433. *Slade v. Drade*, *Hob.* 296. *Margan v. Dyer*, 10 *John.* 161. *Evans v. Munkley*, 4 *Taunt.* 48.) If there be no Court, and no usage at the port, this should be shewn by way of excuse. If there be usage, this should be shewn in order to establish the regularity. It involves a question of law, and should be put upon the record, that we may have a writ of error, if determined erroneously. The regularity is the important and turning point of the controversy. (*Rac. Abr. pleas and pleading*, (I) 3. 1 *Saund.* 298, *n.* (1). *Walker v. Maxwell*, 1 *Mass. Rep.* 104. *Hill v. Montagu*, 2 *M. & S.* 377.) The contents of the survey are important, because it is agreed that if there be a mixed cause of condemnation, it will not operate as a bar. "Where a man avers that he has done a thing which involves in it a question of law, whether it is done as the law directs, the *quo modo* must be averred." (*Per Reeve, J. in Wright v. Tuttle*, 4 *Day's Cas.* 322, 323.) Suppose the pleas had said merely that a survey was held, leaving out the word *regular*,

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824.

Griswold

v.

National
Insurance
Company.

this would have been defective ; and if so, the epithet will not help it, because it has no legal meaning any more than the word *immediately*. No issue could be joined upon either of these words. The law has no ear which listens to such general words. (1 *Chit. Pl.* 240. *Mure v. Kaye*, 4 *Taunt.* 34.) It is like the word *sufficient*. Where a man was bound to shew a sufficient discharge, it was held not enough to aver generally in pleading that a *sufficient* discharge was offered to be shown ; but the party must shew the particulars, in order that its sufficiency may be judicially seen. (*The case of the Abbot of Strata Mercella*, 9 *Co.* 25. a.) Suppose the policy had provided, as is sometimes done, for leaving the adjustment of a loss to arbitrators ; would it be good pleading to say that it had been adjusted by a *regular* award ? Was an award ever pleaded in this way ? No. You must alledge that the matter was submitted, and give a history of the steps taken.

The first plea does not set forth the survey at all, but only its legal effect. Now, though this may answer in declaring, it will not do in a plea. (1 *Chit. Pl.* 236, 237. 1 *Saund.* 276, a. n(2). *Clements v. Lambert*, 1 *Taunt.* 207, *Shepherd, Serjt. arguendo*. *Wright v. Clements*, 3 *B. & A.* 509, *per Holroyd, J.* *Bender v. Sampson*, 11 *Mass. Rep.* 44, 45.) In the last case it is said, of pleading a discharge under a sealed power of attorney, that " It is in all cases to be pleaded specially, how and in what manner the discharge was made : as the sufficiency of such an instrument, the purport and effect of it, is a question of law, which the party whose deed or contract it is alledged to be, has the privilege of referring to the Court."

The Court will not conclude that the survey in the 2d plea is different from the one set out in the 3d and 4th. Now, do these surveys bring the case within the rotten clause ? We wish to argue from both connectedly ; but they have not referred to the first ; and we will take the 3d plea for the present. It alleges that the ship was *bad and rotten*, &c. and the firm opinion of the surveyors that it would be best for all parties concerned that she should be condemned ; but she is not declared incapable of prosecuting the voyage on account of rottenness. It may mean a mixed cause ; and should not be

so construed as to exclude any other. The survey does not say, as in *Steinmetz v. The U. S. Ins. Company*, (2 Serg. & Rawle, 293) that the vessel was decayed, and stop there ; but it finds her "bad" and rotten ; and how are the Court to say that the *badness* is all rottenness ? If *badness* can mean any thing else beside rottenness, it destroys the flat bar, and lets us in to try the question. The plea should have averred, at least, that rottenness was the sole cause.

Again, the surveyors do not say that she was so rotten as to be unseaworthy, or as to be incapable of prosecuting a voyage. This was requisite, though it might have been enough to find that \$5000 were necessary in repairs, had the survey been pending the voyage.

This plea also omits to state previous examination ; on whose application the survey was made ; how the surveyors came to a knowledge of the rottenness ; and in what single particular the ship was rotten. In the cases relied upon to support this plea, there is, at least, an examination stated, and some particulars.

In *Dorr v. The Pacific Insurance Company*, (7 Wheat. Rep. 581) at page 611, *Johnson, J.* says, "The words of the contract expressly look forward to a future event, if the vessel, upon a regular survey, should be thereby declared unseaworthy ; obviously contemplating two objects : first, that a state of rottenness, ascertained at any period of the voyage insured, shall be conclusive evidence of original unsoundness." This shews his understanding that the survey should be made during the voyage.

But we shall probably be met by saying that the voyage was not at an end. Now the end of a voyage is an arrival and remaining in safe moorings for 24 hours ; not if the ship be ordered off for quarantine, it is true ; but if she is there uninjured by any previous mal-accident for 24 hours, she is at the risque of the assured. The voyage in question was ended within this rule. If made within 24 hours, the survey might have been good ; but it cannot be so within the rotten clause, if made after that time. Great strictness should be observed throughout. In *Armroyd v. The Union Insurance Company*, cited from the 2d of *Binney*, therefore, *Tilghman*,

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

Ch. J. says. "I am called on to give my opinion on the construction of the memorandum, and of the survey and condemnation in this case. It is a contract which bears hard upon the assured, especially in long voyages ; but being the agreement of the parties, and not being contrary to law, no Court has a right to say that it is void. It is to receive a fair construction ; but not to be extended beyond the plain meaning of the words. If there is a regular survey and condemnation for unsoundness or rottenness, the assurers are discharged. When I say unsoundness, I mean as the law was decided in *Garrigues v. Cox*, an unsoundness arising from decay, and not from accidental injury. But then the unsoundness or rottenness must be the *sole* cause of condemnation. If the condemnation is grounded partly on rottenness and partly on damages sustained by violence of storms, &c. the case is not within the contract. In the present case the survey and condemnation are regular in point of form. There was a petition to the Judge by the captain, a warrant of survey, a report of the surveyors, and a decree founded thereon. It is not necessary that the Judge should make use of the word *condemn*, in cases of this kind. It is enough if, upon the whole matter, he orders a sale of the vessel. There is no occasion to decide whether, in all cases, there must be a *decree* of a Judge. Surveys may sometimes be made in places where there is no Court. But on this I give no opinion." The opinion of the learned Judge shews also that the survey must be sanctioned by a Court of Admiralty, or something done which is equivalent to this. In the case of *Steinmetz v. The U. S. Insurance Company*, cited from 2 *Sergeant & Rawle*, the same Judge says, "If this be not a condemnation within the meaning of the policy, the clause will be nugatory, because, upon a survey, the particular parts which are found in a decayed state are always mentioned ; and indeed it would not be proper to say, in general, that the vessel was rotten," evincing the Ch Justice's idea of the strict regularity which should attend these surveys.

It may be said we have cured all defect by replying to these pleas. But a replication does not cure any defect which is

the subject of a general demurrer. (*Comly v. Lockwood*, 15 John. 191, per Thompson, C. J. *Anonymous*, 2 Salk. 519. *Com. Dig. Pleader*, (M 1, 2.) The objections that the survey was not made during the voyage; that the sole ground of rottenness is not stated; that the surveyors have not detailed their steps in proceeding to the survey; that the manner and circumstances are not detailed, &c. are objectionable by general demurrer, if so in any shape. At common law a general demurrer reached every defect except duplicity. Then came the statute of 27 Elizabeth, c. 5, & 4 Ann. c. 16, (& vid. 1 R. L. 120, s. 7,) by which a special demurrer is required for every thing but substance involving the merits of the cause, and the right of the case, which these objections do. There is not, in the language of the statute, enough appearing upon the face of these pleas, to enable the Court, according to the right of the case, to give judgment for the defendant. In *Mure v. Kaye*, (4 Taunt. 34,) a general demurrer was allowed, because facts and circumstances were not set forth. In *Beake v. Tyrrell*, (1 Show. 6, Carth. 1, S. C.) a capture and condemnation as prize, were pleaded as a justification, and held bad on general demurrer, because not shewn how the vessel was prize, nor by whom condemned. *Com. Dig. Pleader*, (M. 2.) states that want of certainty is not cured by replying, and cites *Poph.* 209. True, there are exceptions to this rule of *Comyn*; but these are where the want of certainty is merely formal; as if the circumstances going to the regularity had here been informally set out, instead of being omitted altogether. Other cases, where replying has been holden not to cure a bad plea, may be found in *Grocer's Co. v. Archbishop of Canterbury*, (3 Wils. 221, 234,) *Burdick v. Green*, (18 John. 14,) and *Boardman v. Ives*, (10 id. 164. n. (a).) In the last case the question was much the same as here. It related to the form of giving jurisdiction to the Court in pleading, like the present, which is a question of jurisdiction as to the surveyors.

The replications are the same substantially, except that, to the 3d plea. They deny the existence of circumstances

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824.

Griswold
v.
National
Insurance
Company.

which the defendant ought to have stated. In pleading, if the party do not set out an entire instrument, the opposite party may do it. (*Fisher v. Pimbley*, 11 *East*, 188.) We have done nothing more. So much was necessary in order to spread the whole merits before the Court. We were led to it by a want of fulness in the pleas. It is said the replications set out too much, but this will not vitiate. (*Duffield v. Scott*, 3 *T. R.* 374. *Bac. Abr. tit. Pleas and Pleadings*, (I), 4. *United States v. Burnham*, 1 *Mason*, 67.)

Here is no departure. We aver, in the first count, that the vessel was so much injured as to be useless to us—not merely a physical total loss as is supposed. There is then no departure or inconsistency in saying that the vessel arrived at *Cadiz* in a disabled state.

As to multifariousness of matter, you may state what number of facts you please, if they all go to make only one point. (1 *Chit. Pl.* 512, 576. *Patcher v. Sprague*, 2 *John. Rep.* 462. *Currei v. Henry*, *id.* 433. *Thomas v. Rumsey*, 6 *id.* 26.) Accordingly, all the matters shewn by us tend to the same point, which is an irregular survey.

As to the traverse that there is *any other survey*, it is, at most, surplusage. But this traverse applies to the second plea only, which is bad, as professing to set out a survey according to its legal effect merely. You may sometimes traverse matter of law, as simony, seisin in fee, or in tail; thus denying not only the facts, but the law arising from them.

Wells, in reply. The questions in relation to this survey, are mere questions of law; and it is desirable that they should be determined by the Court upon the special pleas. It is said that these are bad, because we have not set out the authority of, and circumstances attending the survey. But by alleging a survey, all the necessary authority and circumstances to render it perfect are insolved equally as if we had mentioned them specifically. It is said that rottenness does not appear to be the sole ground of unseaworthiness; that the word *bad* may signify something else; but *bad* and *rotten* are evidently used as convertible terms. The former

is spoken of as the consequence of the latter, according to the natural import of the phrase.

Again; it is objected that the survey should be pending the voyage; that a survey is not conclusive after the perils of the voyage have ceased, the underwriters then having no interest in it. But the underwriters have an interest in determining whether the vessel was a proper subject of insurance, as being or not being within the rotten clause. The plea says that the survey was made upon and immediately after the arrival; and the Court will presume, if necessary, that this was before the voyage terminated, or the 24 hours' mooring. But the time is immaterial. The survey is in reference to the contract between the parties; and is not to affect their rights of recovery or defence. The plaintiffs would make the curious distinction, that it is valid for their purposes to enable them to recover; but not for ours as a matter of defence. The clause relating to the perils of the sea, doubtless means during the voyage; but cannot be carried forward to the time of the survey. The survey may be made after the voyage in reference either to a total or partial loss, or the right of recovery within the rotten clause. Two things are contemplated. If the vessel be unsound or rotten, and therefore unseaworthy, the underwriters are not to pay if the loss happened from rottenness, whether the vessel arrived or not at the port of destination. The object was not to have the vessel thrown upon the hands of the underwriters as a total loss, when it arose from perils not insured against. It is enough that the survey is made within a reasonable time; and this was so even by the replication.

The form of pleading the survey is proper. It is stated to be a regular survey, held at the port of *Caliz*; and the first plea says that the vessel was found, within the policy, unsound and rotten. Each plea must stand upon itself. (*Per Spencer, J. in Currie v. Henry*, 2 John. Rep. 433, 437.) One plea cannot be invoked in aid of another. These are, therefore, to be considered as distinct surveys in each plea. The law presumes the survey to be regular. A judgment means, *ex vi termini*, a regular judgment. So of a survey;

UTICA,
Aug, 1824.

Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824-

Griswold

v.
National
Insurance
Company.

and in all the cases cited to shew that we must be particular, the party was defending his conduct in a proceeding to which he was a party, if we except the case of the sequestration mentioned *arguendo* in *Hobart*. 296, referred to the year books, (5 *Ed.* 4, 29,) where I presume even this will be found attended with the same circumstance. (a) One is not bound to defend himself by the regularity of a proceeding to which he is not a party. A familiar case is that of a Sheriff sued for the execution of process. It is enough if it appear to be regular upon its face. So of this survey: We are not a party to it. Surveys are made on the part of the assured. The Court will notice, judicially, that this is so. It is the duty of the assured to have the survey made as a matter of preliminary proof; and when presented as such, this is the first knowledge of the underwriters upon the subject. (*Haff v. The Marine Ins. Co.* 4 *John. Rep.* 132. 1 *Chil. Pl.* 220. *Chandler v. Grieves*, 2 *H. Bl.* 606, n. (a).) These cases shew that the Court will take judicial notice of marine customs. We are not bound to, nor can we do more than introduce the simple survey, which the captain is bound to take officially in behalf of the assured. What is one's duty shall be presumed to have been done. (*Bull. N. P.* 298. *Hilts v. Colvin*, 14 *John.* 132.) The plaintiffs, then, are here attempting to impeach a proceeding of their own, carried on for their benefit, of which they claim to avail themselves in preliminary proof, but would impeach, the moment it is attempted to use it against them. It was certainly enough for us to state the survey as they themselves furnished it to us.

Matters which come more properly from the other side, need not be stated by us. (*Com. Dig. Pleader*, (C. 81.) 2 *Saund.* 62, b. n. (5). *Casseres v. Bell*, general principle, per *Ld. Kenyon*, C. J. 8 *T. R.* 167. *Chapman v. Pickersgill*, 2 *Wils.* 147, per *Ld. Ch. J.* *The King v. Holland*, per *Buller*, J. 5 *T. R.* 615.) Now, the underwriter could not know the *quo modo* in which the survey is done. The plaintiffs require him here to set out what he is no party to; and

(a) The case is stated, with about the same brevity, in 5 *Ed.* 4, 29, as in *Hob.* 296.

matter of which he is entirely ignorant. We state enough to constitute a defence ; and the plaintiffs may spread the whole matter before the Court. In *Hill v. Montagu*, (2 M. & S. 377, 378,) Bayley, J. says, " I have always understood that the party who pleads a contract, must set it out, if he be a party to the contract. It lies as much within the knowledge of the defendant as of the plaintiff." In *Wright v. Tuttle*, (4 Day's Cas. 422,) Reeve, J. says, " If the *quo modo* had been averred, it would not have rendered the averment ill ; but it would have been a needless surplusage."

UTICA,
Aug, 1824.
Griswold
v.
National
Insurance
Company.

Now, suppose the pleas to be bad in substance, you cannot always go back to a defect, because it may be reached by a general demurrer. True, in the language of Ch. J. Thompson, quoted on the other side, it must be bad on general demurrer ; but though it be so, if the replication be such as to waive the substantial defect, it cures the plea. Here, had the plaintiffs demurred directly for lack of going into particulars as to the survey, it would have brought up the question ; but by answering over, they have waived the right to except for this cause. *Stutfield v. Somerset*, (Cro. Eliz. 825,) was the case of a palpably bad plea, yet it was cured by a special replication. (Com. Dig. Pleader, (E. 37.) *Knighton v. Morton*, 3 Lev. 311, S. P.)

Curia, per SUTHERLAND, J. This case comes before the Court upon several special demurrers to the plaintiffs' replications to the defendants' pleas in bar ; and the first question for consideration is, whether those pleas are substantially good ; for if not, although the demurrers may be well taken, still the plaintiffs will be entitled to judgment, unless the defects of the pleas are cured by the replications.

The pleadings turn upon the rotten clause in the policy of insurance, which provides, " that if the vessel, upon a regular survey, should be thereby declared *unseaworthy* by reason of her being unsound or rotten ; or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers should not be bound to pay their subscription on that policy."

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

The special plea to the 1st and 2d counts of the declaration, set forth, "that upon and immediately after the arrival of the ship at *Cadiz*, in the course of the said voyage, and in reference to the said voyage, and to any damage which the said ship had sustained in the prosecution thereof, *a regular survey was had, &c. on the 15th day of October, 1819, upon which survey the said ship was thereby declared unseaworthy by reason of her being rotten,*" with a verification; and for further plea to the first count, *a regular survey as before, whereby it was declared that the said ship was in a very bad and rotten condition, and that she was not worth repairing, and that it was best for all parties that she should be condemned, &c.*

The same plea as the last was also pleaded separately to the 2d and 3d counts.

These pleas are said to be substantially bad on three grounds.

1. Because the survey is alleged to have been made after the arrival of the ship at the port of destination, and, of course, after the termination of the voyage insured; and,

2. Because the pleas do not state the manner and circumstances of the survey; but merely state it to have been regular.

3. Because the survey itself, as set out, is bad, and does not amount to a bar.

1. There is no validity in the first objection. The survey was made by the assured as a foundation for an abandonment of the ship as for a total loss, in order to charge the underwriters; and they certainly have a right to avail themselves of it, for the purpose of showing that the injury sustained (and which caused the abandonment) was not owing to any of the perils insured against, but to the rottenness of the ship. The terms of the rotten clause do not render it necessary that the survey should be made before the termination of the voyage, or before the ship arrives at her port of destination. Nor is it exclusively intended to guard the underwriters against the contingency of *her being unable to prosecute her voyage on account of her being unsound or rotten*; but also against all claims of the assured

for any loss or injury which can be traced to the unsoundness, or rottenness of the ship. A regular survey, whereby the ship is declared unseaworthy by reason of her being unsound or rotten, is, by the agreement of the parties, made conclusive evidence of the fact ; and if the survey is made with reference to the voyage and perils to which the policy relates, within a reasonable time after the termination of the voyage, it is sufficient.

UTICA,
Aug, 1824.
Griswold
v.
National
Insurance
Company.

In many cases no survey could be made except at the port of destination ; and in most cases it would be impossible to make it before the termination of the voyage, (that is, within 24 hours after the ship has come to her moorings, and cast her anchor ;) because it cannot be satisfactorily and thoroughly made until the vessel is unladen. But the plea in this case alleges the survey to have been made upon and immediately after her arrival, which, if it were necessary, would be intended to be before the termination of the voyage.

2. It was not necessary to set forth in the plea the manner and circumstances of the survey. It was not done in the case of *Brandegee v. The National Insurance Company*, (20 John. 328.) The pleas there are, in this respect, precisely like those in this case. They simply state, that a regular survey was had, and no objection was made to them on that ground. The survey is the act of the assured, in order to charge the underwriters. The latter are not parties to it. In *Haff v. The Marine Insurance Company*, (4 John. Rep. 135) *Thompson, J.* says, " It (the survey) is to be presumed *prima facie*, to be in the possession of the plaintiff, (the assured.) It is always made at the instance, and for the benefit of the owner or master of the vessel, and it goes of course into his hands."

Whether they would be permitted to impeach the regularity of their own survey, may well be questioned. But it certainly is not incumbent upon the defendants to set forth in their plea all the facts and circumstances which show it to be regular. Not being parties to the survey, they may not know those facts and circumstances. They must be known

UTICA,
Aug. 1824.

Griswold
v.

National
Insurance
Company.

to the plaintiffs, and if they afford any ground for impeaching the regularity of the survey, the statement would come more properly from them, (provided it is competent for them to impeach it.) It falls within the general rule of pleading, that matter which should come more properly from the other side need not be stated. (1 Chit. Pl. 228, and cases there cited; and vid. the opinion of Johnson, J. in *Dorr v. The Pacific Insurance Company*, 7 Wheat. 612.)

3. The survey, as set out in the second plea to the first and second counts of the declaration, is undoubtedly a good bar to the action. After stating the arrival of the vessel at Cadiz, and that a regular survey was had upon her, it states the survey itself, and its result, in the following terms: "Upon which survey the said ship was thereby declared unsound, by reason of her being rotten." The test is, does it appear from the survey that rottenness was the sole cause of condemnation? If it does, the survey is a good bar. But if the condemnation is in part for decay, and in part for damage occasioned by the perils of the sea, then it is no defence for the underwriters. (*Steinmetz v. The United States Insurance Company*, 2 Sergt. & Rawle, 293. *Garrigues v. Coxe*, 1 Bin. 598. *Armroyd v. The Union Insurance Company*, 2 id. 394. *Brandegee v. The National Insurance Company*, 20 John. 328. *Dorr v. The Pacific Insurance Company*, 7 Wheat. 581. *Haff v. Marine Insurance Company*, 3 John. 167.) In all these cases, the survey stated, with more or less particularity, the circumstances of the ship's condition; and the principal inquiry in each of them was, whether all the particulars stated, made out the fact of rottenness to be the sole ground of condemnation.

It seems to be taken for granted, in all the cases, that if the survey states the condemnation to be for rottenness alone, without stating the particulars which are affected, it is conclusive. *Tilghman*, Ch. J. in *Garrigues v. Coxe*, 1 Bin. 595, says, "If the survey should say *she was unsound, and no more*, the plaintiff would be barred." It is true that the same learned Judge, in *Steinmetz v. The U. S. Insurance Company*, (2 Sergt. & Rawle, 297) remarks, "that, upon a survey, the particular parts which are found in a decayed

state, are always mentioned ; and, indeed, it would not be proper to say, in general, that the vessel was rotten." He was reasoning against the position which had been urged by the plaintiff's counsel, that the survey ought to be in the very words of the policy. He thought, instead of confining themselves to the expressions used in the policy, it was proper for the surveyors to state the particulars of the decay. It is undoubtedly proper, but not indispensable.

The *third plea*, which is to the first count alone, states, that a survey was had upon the vessel, &c. by which she was found to be in a very bad and rotten condition. This plea is bad. Rottenness does not appear to be the sole cause of condemnation. A vessel may be in a very bad condition, without being rotten. She may be rotten in some of her timbers, without being unseaworthy. The cause of her condemnation, then, upon this survey, is left doubtful ; and that is a fatal objection to it in a plea in bar.

The *fourth plea*, which is to the second count, is the same as the third, and is bad for the same reasons.

The *fifth plea* is to the third count, and is the same as the two last, (except that part which relates to the general average) and is bad for the same reasons.

These pleas being bad in substance, are not cured by the replication ; for a bar which wants substance cannot be aided by a replication. (Com. Dig. Pleader, (E, 37). 8 Coke, 120, b. Com. Dig. Pleader, (M. 1, 2). 2 Salk. 519. 15 John. 191, per Thompson, Ch. J.) It is unnecessary, therefore, to consider whether the demurrers to the replications to these pleas are well taken or not ; for the pleas being bad, the plaintiff must have judgment.

It remains, then, only to consider the causes of demurrer to the replication to the 2d plea. The first cause of demurrer assigned is, that the traverse seeks to put in issue matters not in the plea. The plea states a survey made at Cadiz. The replication traverses a survey at Cadiz or elsewhere. The issue must be as broad as the traverse ; but a rejoinder as broad as the replication would have been a departure from the plea, and have subjected the defendant to a demurrer. That cause is well taken. It is also a depar-

UTICA,
Aug. 1824.
Griswold
v.
National
Insurance
Company.

UTICA,
Aug. 1824.
Gardner
v.
Buckbee.

ture from the declaration. It alleges the survey to have been at *Cadiz*, after the arrival, whereas the declaration avers a physical total loss.

The defendants are, therefore, entitled to judgment upon their demurrers to the replication to the second plea; with leave to the plaintiffs to amend, on payment of costs: and the plaintiff must have judgment upon the replications to the other pleas.

Judgment accordingly.

GARDNER *against* BUCKBEE.

The judgment of a court of concurrent jurisdiction, directly upon a point, is conclusive between the same parties, upon the same matter coming directly in question in another suit; And this, whether it be pleaded, or given in evidence under the general issue.

It is conclusive, whether it appear upon the face of the record in the former suit, that the same matter was tried and passed upon, or not.

If it was, in fact, so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried upon the pleadings in the record.

Where *B* sued *G* upon a promissory note, in the marine court, and *G* pleaded the general issue, with notice that the note was given upon the fraudulent sale of a vessel by *B* to *G*, which was the question upon the trial, and the verdict was for the defendant; and afterwards *B* sued *G* in the common pleas, upon another note given upon the same purchase; held, that upon the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud, and were a conclusive bar to the second action; that the proper course was to give the record of the marine court in evidence, and then shew by parol evidence, (e. g. by the justice who tried the first cause) that the same question had been tried before him.

Whether, in *assumpsit*, a former trial for the same cause may be given in evidence under the general issue? *Quere.*

issue, accompanied with notice of a total failure of consideration, on the ground of fraud in the sale of the schooner, and a trial being there had, on this very point, judgment passed in favour of the plaintiff in error. The defendant in error then brought this action on the remaining note, against the plaintiff in error, in the Court of Common Pleas for the city of *New-York*, and at the trial, the plaintiff in error offered in evidence, in bar of the suit, the record of the judgment in his favour, on the other note, in the Marine Court, contending that it was conclusive; the defence, by the notice in this case, being fraud, and the judgment offered in evidence being directly on the point in issue, and between the same parties. The Court of Common Pleas decided, that the judgment was no bar, but admitted it in evidence to the jury, in connexion with other proof of fraud; to which opinion the plaintiff in error excepted. The case will also be found stated at large in the opinion of the Court, to which I refer for the manner in which the proceedings on the first trial were made out.

ETICA,
Aug. 1824.

Gardner
v.
Buckbee,

J. Anthon, for the plaintiff in error,

1. This case falls so fully within the rule laid down by *C. J. De Grey*, in the *Dutchess of Kingston's* case, as to preclude all argument. (Vid. 11 *State Trials*, 261. 1 *Phil. Ev.* 223.) He says, "Relative to judgments being given in evidence in civil suits, it seems to follow as generally true, that the judgment of a Court of concurrent jurisdiction directly on the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another cause." "Where several Courts have each an original, direct and concurrent jurisdiction, the same question may arise in each of them, either directly or indirectly, and either Court may decide the cause, But if the matter be directly decided by either Court, before the decision of the same question is brought forward in the other Court, such decision would be final."^(a) "The decision of a Court of competent jurisdiction, directly upon the same point, is conclusive, when the same point comes again in controversy between the same parties, directly or

(a) *Gahan*
v. Maingay, 1
Irish T. R. 54

UTICA,
Aug. 1824.

Gardner
v.
Buckbee.

collaterally.”(b) “It is a well established rule, in *England*, that the judgment, sentence, or decree, of a Court of exclusive jurisdiction upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another Court.”(c) The same rule applies when the Courts have a concurrent jurisdiction.(d) “A person is, in all cases, concluded by a decree, sentence, or judgment, of a Court of competent jurisdiction, in a suit in which he was a party, in all future trials of the same question, and whether that question arises directly or collaterally. And such judgment is conclusive, not only of the rights it establishes, but of the fact which it decides.”(e)

2. This record was admissible in evidence under the plea of non-assumpsit, and did not require to be specially pleaded. “In an action of assumpsit, the defendant may either plead a judgment recovered, or give it in evidence under the general issue.”(f)

J. Wyckoff, contra. Whatever was the former law upon the subject, the latest adjudications require that a former judgment should be pleaded *specially*, and refuse to receive a record in evidence, under the plea of *non-assumpsit*. (*Vooght v. Winch*, 2 B. & A. 662.) In this case the doctrine, as laid down by *Ld. Mansfield*, “that a former recovery need not be pleaded in bar, but may be given in evidence under the general issue,” is overruled by *Abbott*, Ch. J. and *Bayley & Holroyd*, Justices.(g)

2. The former judgment should have been pleaded by way of estoppel; but the plaintiff in error has elected to

(b) 1 Pet. Rep. 202. *Wright v. Deklyn*, Circuit Court U. S. per Judge Washington.

(c) *Croudson v. Leonard*, per *Johnson*, J. 4 Cranch, 436.

(d) 1 Irish T. R. 54.

(e) *Outram v. Morewood*, 3 East, 345. 6 Mass. T. R. 277. 8 id. 524. 11 id. 445. 12 id. 268.

(f) *Bird v. Randall*, per *Ld. Mansfield*, 3 Burr. 1353. 1 Chit. 473. 1 Phil. Ev. 224. 16 John. 136.)

(g) 1 Phil. Ev. 225, note.

submit *all the facts in evidence* to the jury, by pleading the general issue. (h)

3. The record of the Marine Court neither negated nor affirmed any *particular* fact in issue, but the judgment was *general and indefinite*; and as the actions in the Marine Court and the Court of Common Pleas, were upon distinct obligations, payable at different times, the defences were founded upon the same or a different state of facts, neither inferrible from the language of the record; for the record must be taken by itself, unconnected with the parol explanations of the Justice who rendered judgment. (i)

By the record of the Marine Court, therefore, no single fact in issue appears to have been decided, which would necessarily arise under the pleadings in the cause in the Court of Common Pleas. The record, therefore, would be no bar, even if pleaded specially, for it must be upon the same point in issue in both causes. (j)

Arthon, in reply. The case of *Vooght v. Winch*, (k) on which, alone, the defendant in error relies, is not law. The argument of *Marryat, James & Comyn*, in that case, sets forth the law truly, and consistently with the opinion of the twelve Judges in the *Dutchess of Kingston's* case, which, from the time it was decided, down to the year 1819, when *Vooght v. Winch* was decided, has been the unquestioned law of England.

The conclusiveness of records, when given in evidence, underwent a very full discussion in the Exchequer Chamber in Ireland, upon a writ of error, in the case of *Maingay v. Gahan*, (l) and was fully sustained, on the authority of the *Dutchess of Kingston's* case.

It is absurd, and against sound reason, that a record which imports perfect verity, should be conclusive when offered to the Court, and of no positive avail when left to a jury. In the language of *Marryat*, in *Vooght v. Winch*, (m) its effect surely cannot be varied by the mode in which it is brought before the Court.

The doctrine of the *Dutchess of Kingston's* case, independent of the other authorities cited for the plaintiff in error, is

UTICA,
Aug. 1824.

Gardner
v.
Buckbee.

(h) *id.* and 3
B. & A. 662.

(i) 1 Phil.
Ev. 218.

(j) 1 Phil.
Ev. 223, and
the authorities
there cited.

(k) 2 B. &
A. 662.

(l) Irish T.
R. 1 to 30.

(m) 2 B. &
A. 666.

UTICA,
Aug. 1824.

Gardner
v.
Buckbee.

(n) 2 Wash.
Rep. 64.
(s) 1 Phil.
Ev. ch. 2, s. 1,
p. 223.

supported in the case of *Shelton v. Barbour*.(n) Mr. Phillips, also,(o) at the very place cited by the defendant in error, rejects his doctrine, and that of the Judges in *Vooght v. Winch*, and says, "In an action of assumpsit the defendant may either plead a judgment recovered, or give it in evidence under the general issue, and it is difficult to assign a reason why the judgment should not have the same conclusive operation, if given in evidence without pleading, as it would be admitted to have if pleaded in bar." He also notices the doctrine of *estoppel*, relied upon by the defendant in error, and confines it to its legitimate subject—"title in the realty."

(p) 2 John.
Rep. 28.

As to the third point made by the defendant in error, which relates to the generality of the record in the Marine Court, the fact is mis-stated. The plea was *non-assumpsit*, with *special notice of failure of consideration*, which is tantamount to a special plea. In the case of *Maurry v. Harris*,(p) Spencer, J. lays down the true rule as to auxiliary testimony in aid of a record. In commenting on the record offered in evidence in that case, and the auxiliary proof received by the Judge who tried the cause, he observes, "It is, therefore, only necessary to enquire whether that issue warranted the giving the present bond in evidence, so that the jury might allow it to the plaintiff; for if the issue did not embrace the present cause of action, evidence ought not to have been received that the jury did decide upon it. This language, as applied to this case, would be, "It is, therefore, only necessary to enquire whether the issue in the Marine Court warranted the giving in evidence the matters offered by the defendant in his defence in the Common Pleas; for if the issue did not warrant it, the evidence ought not to have been received that the jury did then decide upon it." Now the issue below was expressly on the point; the testimony of the Justice, shewing that the Court had decided the very point, was admissible, (and, indeed, was received without opposition) and made the record conclusive, leaving to the opposite party the right to contradict him, if this could be done.

It is true that, from the form of the pleadings, the whole case necessarily went to the jury. But the Judge was bound to charge them as to the effect of documentary evidence in the law. He ought, therefore, to have charged them, that if, from all the evidence, they should find that the matters between the parties had been passed upon in the Marine Court, then the record was final. Instead of so doing, he totally neutralized that evidence, by charging that it was entitled to their *serious consideration*, to which indefinite charge we excepted.

UTICA,
Aug. 1824.
Gardner
v.
Buckbee.

Curia, per WOODWORTH, J. This is a writ of error to the Common Pleas of the city of *New York*. *Buckbee*, plaintiff in the Court below, commenced an action against *Gardner*, on a promissory note. The defendant pleaded the general issue, and gave notice of special matter, that the note was given in part payment for a vessel called the *Tiger*, sold to the defendant and others, and alleged fraud by the plaintiff in the sale; the vessel being at the time rotten and unseaworthy, and that known to the plaintiff. At the trial the plaintiff admitted, that the note was one of two promissory notes, for the same amount, given by the defendant and two others, as the consideration upon the sale of the vessel.

The defendant offered to prove, in bar of the plaintiff's demand, that the plaintiff impleaded the defendant, in the Marine Court of the city of *New York*, upon a promissory note, bearing even date, and for the same amount as the one now in question, signed by the same parties, and given for the consideration money; that, upon the trial in the Marine Court, the fraud of the plaintiff in the sale was the only point in question; and that judgment had been rendered in that Court in favour of the defendant, on the ground that the sale was fraudulent. The plaintiff objected to the testimony, because the judgment had not been pleaded, or notice given; and that the note on which the present suit was brought, is a different instrument from that declared on in the Marine Court. The Judge declared the evidence was not admissible, in that stage of the cause, but might be

UTICA,
Aug. 1824.

Gardner
v.
Buckbee

offered, after proof to the jury of the fraud, and in support thereof, to which the defendant excepted.

The defendant, then, in proof of the fraud, offered in evidence the record of the judgment in the Marine Court, in favour of the defendant, on the other note. By the record it appeared that the defendant pleaded the general issue, and gave notice of a total failure of the consideration. *I. B. Scott*, one of the Justices of that Court, testified, that the matters directly in question before the Marine Court, were, the unseaworthiness of the vessel at the time of sale, and the knowledge of that fact by the plaintiff; it not being disclosed at the time of sale to the defendant.

The counsel for the defendant then insisted, that the record was a judgment of a Court of concurrent jurisdiction, upon the same matters in question in the Court below, and was conclusive evidence in favour of the defendant to entitle him to a verdict. The Judge decided, and charged the jury, that the matters given in evidence by the defendant, were not, in themselves, sufficient to bar the plaintiff's action, but were entitled to the serious consideration of the jury, and were to be taken by them in conjunction with the other evidence of fraud offered in proof. The jury found a verdict for the plaintiff. The defendant excepted to the opinion.

It appears clearly that the question of fraud was tried between the parties, in the Marine Court, on one of the notes given in part payment of the vessel. That Court had concurrent jurisdiction. The question is, whether the judgment thus obtained is not a conclusive bar to a recovery in this cause? The law is well settled, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea in bar, or evidence, conclusive between the same parties, upon the same matter directly in question in another Court. This was the rule laid down by *De Grey*, Chief Justice, in delivering judgment in the *Dutchees of Kingston's* case. (11 *State Tri.* 261. 1 *Phil. Ev.* 223. 1 *Peters' Rep.* 202, *Cir. Court U. S.*) I am not aware that it has been departed from by our Courts. The general principle does not appear to be controverted by the counsel for the defendant

UTICA,
Aug. 1824,
Gardner
v.
Buckles,

in error; but it is urged that the judgment in the Marine Court does not affirm any particular fact in issue in this cause, but is general and indefinite; and that, from the language of the record, it cannot be inferred whether the two cases were founded on the same or a different state of facts. It is true, the record merely proves the pleadings, and that judgment was rendered for the defendant. Without other proof it would not make out the defence. The record shows that it was competent, on the trial, to establish the fraud of the plaintiff. Whether fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrinsic to the record. To do so is not inconsistent with the record, nor does it impugn its verity. The jury must have passed on the fraud. It was directly in question. *Scott* testifies that the unseaworthiness was not disclosed at the time of sale to the defendant. The inquiry, then, was solely directed to the question, was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between these parties, on these points, and is an effectual bar to the action to recover the residue of the consideration money. It is unnecessary to consider whether the record was admissible in evidence under the general issue, without notice. It was admitted, and no exception was taken on that ground. The effect ascribed to it seems to be the material question in the case. It is in general true, that, under *non-assumpsit*, most matters in discharge of the action, which show that at the time of the commencement of the suit the plaintiff had no cause of action, may be taken advantage of. (1 *Chit.* 472.) This rule may appear somewhat arbitrary, as the object of pleading is to apprise the adverse party of the grounds of defence. It is, however, peculiar to this action, although, as *Chitty* observes, not according with the logical precision which usually prevails in pleadings. The Judge ought to have charged the jury, that if, from the evidence, they were satisfied that the matters in question had been passed upon in the Marine Court, the record was conclusive against the plaintiff's right to recover.

UTICA,
Aug. 1824.

Bradford

v.
Consaulus.

I am of opinion that the exceptions are well taken, and that the judgment ought to be reversed.

Judgment reversed.

BRADFORD, impleaded with QUACKENBUSH, against CONS-
SAULUS, assignee of the Sheriff of the county of *Schenectady*.

A prisoner enjoying the gaol limits under a bond of surety, conditioned that he shall remain a true and lawful prisoner, was arrested on a charge of felony, and committed to close confinement; and while so confined, broke the gaol and escaped: held, that the surety was not liable.

ERROR from the Court of Common Pleas, of the county of *Schenectady*. The action in the Court below was debt on a gaol bond, by *Consaulus*, as assignee, under the statute (1 R. L. 429, s. 6, 7.) The bond was dated *May 19th*, 1819, executed by the defendants below, and after reciting that *Qackenbush* was confined in the gaol of *Schenectady*, by virtue of an execution in favour of the plaintiff below, for \$131,27, the condition was, that if *Qackenbush* should remain a true and faithful prisoner, within the gaol liberties, and should not escape, &c. then the bond to be void.

It appeared upon the trial, that *Qackenbush*, while within the liberties by virtue of this bond, on the *29th August*, 1819, was, by virtue of criminal process, on a charge of felony, committed to close confinement in the *Schenectady* gaol; from which he escaped *March 27th*, 1820, by breaking the gaol. It was for this escape that the action was brought. The counsel for the defendant below, on this ground, moved for a nonsuit, which was overruled; and a bill of exceptions taken to this point. Verdict and judgment for the plaintiff below.

A. C. Paige, for the plaintiff in error. The Sheriff cannot hold a double security against the escape of a prisoner in custody on civil process. If he have the common law security of the prison doors, he cannot have the statute security of a bond. By a commitment for felony, the Sheriff acquired his common law security, and his statute security ceased. It is, in law, equivalent to a surrender of the

prisoner by the surety to the Sheriff, and operates as a discharge of the bond. Besides, to bring the escape within the bond, it should be from the gaol limits, while the prisoner is in their enjoyment. The escape was owing to the negligence of the Sheriff. After he had the prisoner in close confinement, he should have kept him at his peril; he cannot make his own neglect a cause of action against the surety; and the assignee has no greater rights than his assignor. (10 *John*. 583, 4.) Again: the liberty of the debtor is the consideration of the bond, which fails as soon as he is committed to close confinement. To hold the bail after this, would be unreasonable. It is true, the bail have no right to make a formal surrender; but they are discharged by operation of law. It is like the case of special bail where the principal is confined in the state prison. An *exoneretur* will be entered even after the time for a regular surrender has expired. (*Cathcart v. Cannon*, 1 *John*. *Cas.* 28.) At least, the bond was suspended in its operation during the imprisonment; and a personal obligation once suspended is destroyed. A limit bond is one of indemnity merely. (*Barry v. Mandell*, 10 *John*. 583.) The right to grant the limits to a prisoner is confined by the statute (1 *R. L.* 429, s. 6,) to *civil process only*; and it is absurd to say that a bond could not be taken after the confinement for felony, and yet should be operative. Had *Qackenbush* been committed to close custody on another execution, it would equally have rendered this bond inoperative; for the statute was not intended to enlarge the Sheriff's security; but only to substitute one security for another. A commitment imposes the common law duty upon the Sheriff of keeping the prisoner at his peril. The custody of the body is a complete and perfect security in itself. Like every other agreement, the bond should be construed according to the intention of the parties. This was to give liberty to the prisoner; and shall the surety be liable, when the object of his bond is not attained? If the surety is insufficient, the Sheriff may commit for that reason alone. (1 *R. L.* 429, s. 6,) while the surety has no control over his principal; and

UTICA,
Aug. 1824.

Bradford
v.
Consaulus.

UTICA,
Aug. 1824.

Bradford
v.
Consaulia.

he would be remediless unless discharged by this act of the law ; whereas, to hold him released, would be doing justice both to the Sheriff and surety. The bond is intended for the indemnity of the *Sheriff only*. It must pursue the statute strictly, or it is void ; and, to make it good, the case should come precisely within the statute. The condition of the bond was complied with. It is, that he should *remain a true and faithful prisoner on the limits*. This must be construed according to the subject matter. It presupposes a volition on the part of the prisoner to stay or to escape. While he had this, he did remain a true prisoner.

S. A. Foot, contra. The records of English jurisprudence afford no example of this defence. That it is the first in this country, is also proved by the fact that no authority in point is produced.

Here was neither an actual nor constructive surrender of *Quackenbush*. To constitute the former, the sureties must deliver the prisoner to the Sheriff ; and give him notice that they will no longer be holden. Can there be a constructive surrender ? No adjudged case for this is produced. If we admit the operation of the bond to be commensurate only with the allowance of the gaol liberties, there is nothing here to show that the Sheriff denied these to the prisoner. To deprive the Sheriff of all security from the bond, it should be shown that he was in default. The commitment here was for a distinct cause, and by operation of law. After the cause of imprisonment is removed, or the prisoner removes it himself, he returns to the limits. A case might be supposed in which it would be very hard upon the Sheriff to be bound to a detention of the prisoner, at all events. Suppose the latter committed for a trifling cause, in consequence of which the Sheriff relaxes his vigilance, and even suffers the prisoner to go at large, as he may do, perhaps, with safety, so far as the second cause of commitment is concerned ; shall such a commitment (it may be) for a moment, work a discharge ? The cases of *exoneretur* do not apply. No doubt the surety might have given notice to the Sheriff, that he would no longer be liable,

which would operate as a surrender. If transferred to the state prison by process of law, this would not be an escape. It would confer no right of action against the Sheriff, and none by him against the sureties ; for we agree that the bond is one of indemnity merely. It is said, too, that a second commitment on execution, would work a discharge ; but a case is stated by the Court, in *Hempstead v. Weed*, (20 John. 72.) which negatives this idea. *Westby v. Skinner & Catcher*, (3 Rep. 71, & Cro. Eliz. 365.) is there cited, where the debtor was in the Sheriff's custody, on two executions ; and was delivered over by the Sheriffs on their going out of office, to their successors, on one of the executions only, omitting that of the plaintiff ; and after this assignment, the debtor escaped. It was held, that the debtor was out of the custody of the old Sheriffs, and could not be in custody of the new, on the plaintiff's execution. This shews that each execution stands on separate and independent grounds. The Sheriff would not be bound to hold upon the second execution, because he has no notice but that the surety is still willing to be bound. Would it be fair to make him accountable without notice ? Such a doctrine would lead to great confusion, and produce very serious difficulties. Suppose the first execution only 25 dollars, upon which a gaol bond is taken, and the debtor is afterwards committed on one for \$10,000, but discharged from the latter : must the Sheriff take a new bond, or does the prisoner return to the limits and with him the liability of the surety upon the first execution ? The criticism upon the terms of this bond begs the question. The prisoner returns to the limits as soon as he is out of close confinement.

Paige, in reply. That no precedent for this defence is to be found, can be no objection to it ; at least, in *England*, where they have no such statute as the one under which this bond was given. A contract cannot be dissolved by the act of one party only. Mere notice from the sureties, therefore, would not discharge them. It would be without effect. The act and operation of law is what we rely up-

UTICA,
Aug. 1824.

Bradford
v
Consaulus.

UTICA,
Aug. 1824.
Bradford
v.
Consaulus.

on ; and it is enough for our purpose to shew that the bond was inoperative while *Quackenbush* was in close confinement. Whether the bond was cancelled or suspended, the result is the same.

Curia, per SAVAGE, Ch. J. By the statute (1 R. L. 429,) it is the duty of the Sheriff to permit any prisoner who shall be in his custody on *civil process only*, to go at large within the limits, &c. on giving a bond with sureties. It follows, that if a prisoner be confined on *civil and criminal process both*, the Sheriff cannot take such a bond. If the imprisonment be inconsistent with the liberties of the limits, and a bond should be taken, it would be void.

The enjoyment of the liberties of the limits by the prisoner is, then, the consideration of the bond ; and when the consideration fails, the obligation must be at an end. The bond is taken for the indemnity of the Sheriff only ; but when the prisoner is in close confinement, the Sheriff wants no indemnity. If he should desire it, he cannot take it. The bond, in this case, was valid when taken ; but, by subsequent circumstances, the consideration failed. Shall the obligation, then, continue ? The prisoner was placed in a situation which rendered the taking a bond from him unlawful. Shall the Sheriff then be permitted to retain a security which it would be unlawful for him to take ? Or shall the previous obligation be suspended ? If so, it must remain suspended till the prisoner is discharged from the criminal accusation. The Sheriff is authorized to commit any prisoner upon the limits on a bond, if he shall discover that his bail is insufficient. Suppose the Sheriff, in this case, had committed *Quackenbush* for that cause, would the bail be holden for an escape ? Clearly not. It seems to me, therefore, that the enjoyment of the limits by the prisoner, is not only the consideration, but the condition of the bail's liability. This seems to follow from the language of the bond itself. The condition is, " that the prisoner shall remain a true and faithful prisoner within the liberties of the said gaol ; and shall not, at any time, or in any wise, escape or go

without the limits of the said liberties, until, &c. But if, after taking the bond, the Sheriff does not choose to permit the prisoner the use of such limits, surely neither law nor justice should permit him to hold the sureties liable for an escape from the walls of the prison. In my opinion, the Court below erred, and their judgment should be reversed:

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

Judgment of reversal.

KELSEY against DEYO & WIFE.

ERROR from the Court of Common Pleas of the county of Ulster. The action in the Court below was assumpsit by Deyo and wife against Kelsey, for a legacy bequeathed to them by the will of Nathaniel Kelsey, deceased, and alleged in the declaration to have been charged on his real estate devised to the defendant below. The declaration averred that the defendant entered into possession of the premises devised to him by the will, thereby became liable to pay, and, in consideration thereof, promised to pay the plaintiffs, the legacy so charged. Plea, non-assumpsit.

An action at law lies for a legacy directed by will to be paid by a devisee of lands, and expressly charged on the lands; if the devisee has entered upon the lands, & promised to pay it.

Part payment is conclusive evidence of such a promise.

So where, from the whole will, it appears to have been the intention of the testator that the legacy should be a charge on the land devised:

On the trial, the will of Nathaniel Kelsey, dated April 9th, 1803, duly executed to pass real estate, was given in evidence by the plaintiff, containing, among others, the following devises and bequests: 1st, That all his debts be paid out of his personal estate; 2d, He gave to his wife, Lucretia Kelsey, all his personal estate, after paying his debts, except what he thereafter granted to his daughter Sarah Kelsey. He

although the land was not expressly charged with its payment.

Where a testator bequeathed his personal estate to his wife for life; and what should remain of this at her decease, over, to be equally divided between all his children; and then devised his real estate to one of his sons; and bequeathed certain legacies in money to his other children, to be paid by his son, the one half to be paid in two years after his (the testator's) decease; and made his son the devisee, with others, executors; and his son entered into possession, and paid part of one of the legacies; held, that an action lay for the residue of this legacy.

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

also gave to his wife the use, profit and benefit of his homestead farm; also the right and privilege of cutting timber for fire wood and other uses as she might want; also pasture for cattle and horses, as usual, in and on his farm adjoining the mountain; the above rights and privileges bequeathed to his wife to continue undisturbed during the term of her natural life; and at her decease, what remained of his personal property, to be equally divided between all his children or their heirs. He then bequeathed to his son *Nathaniel Kelsey* (the defendant below) all his real estate to him and his heirs forever, excepting such rights and privileges as had theretofore or should thereafter be granted by him respecting the premises. The will then proceeded as follows: "And I do hereby order and direct that my son *Nathaniel Kelsey*, (the defendant below) or his heirs, pay the following legacies, that is to say: to my daughter *Abigail Woolsey*, the sum of £100; to my daughter *Lucretia Verhooy* £100; to my daughter *Julia Deyo* (who, and her husband, were plaintiffs below) £100; the one half of each of the above legacies to be paid within two years after my decease; and the other half to be paid in two years after the decease of my wife, without interest." He then gave to his daughter *Sarah Kelsey*, the use of his bed room with a fire place up stairs: and a proportionable right in the kitchen, cellar and chamber in his dwelling house; the privilege of fire wood and apples; hay and pasture for two cows; and the use of the barn and other out-houses; to continue to her so long as she remained unmarried, but no longer: that if there should be any money to be paid at the decease of his (the testator's) father and *Hannah* his wife, to the heirs of his father, as specified in an agreement between him and his father, it be paid by his son *Nathaniel Kelsey* (the defendant below) as soon after his father's decease as his (*N. K's.*) circumstances would admit, to be paid out of the real estate, without interest. The will then appointed *Kelsey* (the defendant below,) *Woolsey*, the testator's son-in-law, executors, and the testator's wife executrix.

It was admitted by the defendant below that he had entered upon the lands and premises described in the will in pursuance of the devise to him; and occupied and possessed

UTICA,
Aug. 1824.
Kelsey
v.
Deyo.

them from the year 1803, until the time of the trial, *April*, 1821; and that during that period, and before the commencement of the suit, he had, at different times, made payments to the plaintiff on the legacy to them, reducing the same to \$191,28. Upon this, the plaintiffs below rested their cause.

The defendant below moved for a nonsuit: 1. because the will in evidence did not support the plaintiffs' action; 2. because the legacy bequeathed to *Deyo's* wife was payable out of the personal estate of *Nathaniel Kelsey*, and was not a charge upon the real estate. The Court below overruled the motion; and charged the jury to find for the plaintiffs the above sum of \$191,28, which they found accordingly. The defendant below excepted upon the above two points, and the questions came here upon a bill of exceptions.

J. Sudam, for the plaintiff in error. If the devise had been declared upon in the words of the will, the defendant might have demurred generally. No consideration for the promise is expressed in the will. It is merely directory. There is, therefore, a variance between the declaration and the proof. The declaration states a consideration; but none is made out in evidence. The testator says, "I do hereby order and direct" that my son *Nathaniel Kelsey* pay the legacy. The devise of the real estate to him was *absolute*; the order to pay the legacy was directory merely.

Is the real estate charged with the payment of these legacies, in exclusion of the personal property? Unless it be so, the latter must be called in. Unless the legacy is expressly charged on lands specifically devised; or the sale of real estate is directed for the payment, the personal property is never exonerated, if we except specific bequests. This is an unerring rule, whenever it appears by the will that the testator understood the difference between an express and implied charge. The legacy in question being general, and there being a debt specifically devised to be paid out of the land, shew that he did understand the difference perfectly. I allude to the debt that may be due upon the agreement between the testator and his father, which is made payable

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

out of the real estate expressly. The testator gives real estate absolutely ; he gives several legacies, without expressly designating any fund from which they are to be paid ; and then, at the close of the will, he expressly charges the real estate with the payment of a single legacy. It is enough for us to shew that the personal estate should come in aid of the real ; for if so, this cause belongs exclusively to the Court of Chancery ; and a Court of common law has no jurisdiction. This question was examined in *Livingston v. Newkirk*, (3 *John. Ch. Rep.* 319.) That was certainly a stronger case in favour of charging the real estate, than the present ; but the Chancellor refused to charge the real estate ; and sums up the doctrine in these words : "It is too well settled to be questioned, that the personal estate is to be first applied to the payment of debts and legacies, and that a mere charge on the land will not exonerate the personal estate, nor any thing short of express words, or a plain intent in the will of the testator." If the legacy was a condition to the enjoyment of the real estate, the legatee should enter as for a condition broken. The remedy is not by action. The general principles of the common law were all in favour of charging the personalty ; and the question, when the real estate might be resorted to, was in an unsettled state till the case of *Ancaster v. Mayer*, (1 *Br. Ch. Cas.* 454.) The subject was there very fully considered. It was found obscured and involved in a labyrinth of loose and careless dicta. But that case places it upon its proper footing ; the intent of the testator ; and gives the rules for arriving at his intention. The Chancellor goes back to first principles ; and concludes that to warrant a resort to real estate, it must be expressly charged.

It is true that this Court have, in several instances, taken cognizance of actions for legacies of this description ; but it will be found that, in all those cases, the charge on land was specific. In *Beecker v. Beecker*, (7 *John. Rep.* 99) the real estate was devised, *subject to the legacy*, in terms ; and Kent, Ch. J. who delivered the opinion of the Court, places the case on the ground of its being an express charge on the land. There is also a distinction between the effect of a charge on the person and on land. In the former case the will carries a fee without words of perpetuity. (*Van Orden*

v. Van Orden, 10 *John. Rep.* 30.) To work this consequence, the person must be expressly, not impliedly charged. In *Pelletreau v. Rathbone*, (18 *John.* 428) both the real and personal estate were expressly charged; and it was holden that the action would not lie. The party is driven into Chancery even in such a case, where the assets may be marshalled, and the personal assets are liable in the first instance. Debts and legacies are on the same footing in this respect. Had *Kelsey* been directed to pay debts, the personal estate must have been applied in the same manner (Toll. *L. E.* 240.(a) 2 *Bl. Com.* 512.) There is a class of cases in which legacies were given in various ways by words pointing more directly to the real estate than here, and which yet were holden not to charge it. (*Manning v. Spooner*, 3 *Ves. Jun.* 114.) In *Milnes v. Slater*, (8 *id.* 295) *Ld. Eldon* agrees that, to exonerate the personal estate from the payment of debts, it must be exempted by declaration plain, or inference as plain. And in *Ancaster v. Mayer*, (1 *Br. Ch. Cas.* 459, 460,) *Ld. Thurlow* said, "one step has been taken towards a settled rule, by its being laid down that charging the estate in any way is not, of itself, an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or equitable fund, it must be itself in the first place applied." He then states the very case under consideration: "The question that next arises is, whether a real estate being charged and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject: on the contrary, I have always understood, that in order to exempt the personal estate, the testator must express an intention so to do." That case was one of a general charge, as here. The personal estate was given over to one distinct from the person charged with the legacies; but the bequest of the personal property was holden subject to the payment of the legacies. "I therefore," says the Chancellor, "take the rule in *primis* to be, that neither the charge of the debts upon the real estate, or the gift of the personal, is sufficient of itself to exempt it." In

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

(a) P. 332 of
the Phil. ed.
1803.

UTICA,
Aug. 1824.

Kelsey

Dayo.

Ld. *Inchiquin v. French et al.* (Ambl. 33, 37) decided in 1744, it was holden that personal estate was not exempt from debts and legacies by devise of a competent part of real estate to be sold to pay them ; that the intention to exempt the personal property must be manifested by a specific bequest of that property. Thus early was this doctrine established by Ld. Hardwicke. (*Watson v. Brickwood*, 9 Ves. 447, S. P.) In *Ancaster v. Mayer*, it was held to be immaterial what words were used, unless the legacy was expressly, definitely and exclusively charged upon the real estate. Otherwise the personal must first be exhausted. The case depends upon authority. No matter what may be thought as to expediency. The law has been settled against this action for ages. The case of *Watson v. Brickwood*, (9 Ves. 447,) considers the question as put at rest by *Ancaster v. Mayer*. It is true, there is some confusion in the cases upon the question, if the same rule shall apply, whether the bequest over be general or specific ; but *Webb v. Jones*, (2 Br. Ch. Rep. 60) decides that the testator cannot exonerate the personal estate without expressly providing another fund. Suppose there had been no words of inheritance in relation to this devise ; though the legacy had been expressly charged on the land, it would not have carried a fee ; otherwise, if a personal charge on the devisee. In the first case it would be for life only. (*Jackson v. Martin*, 18 John. Rep. 31.) In either case, the personal property would not be exonerated ; because the will creates no fund. (*Lupton v. Lupton*, 2 John. Ch. Cas. 614, 623, and the cases there cited.) In the last case the Chancellor says, " When the real estate is charged, and not in the most explicit and direct terms, it is usually done in terms that indicate a pretty clear intention that the legacies were, at all events, to be paid. Thus, where the testator devises the real estate, after payment of debts and legacies, as in *Tompkins v. Tompkins*, (Prec. in Chan. 397,) and in *Shallcross v. Finder*, (3 Ves. 738,) or where he devises the real estate, after a direction that debts and legacies be first paid, as in *Holt v. Vernon*, (Prec. in Ch. 430,) and in *Williams v. Chitty*, (3 Ves. 545,) the real estate has been held to be discharged. It is not sufficient that debts

or legacies are directed to be paid. That alone does not create the charge ; but they must be directed to be first or previously paid, or the devise declared to be *after* they are paid." He gives it as the result of all the cases, that a bequest of several legacies by a testator, and then devising the residue of his real and personal property to one, *after payment of debts and legacies*, does not create an exclusive charge on the real estate. Courts of Equity will never marshal assets in favor of a legatee, unless there be a trust in the executors for that purpose expressly in respect to the real estate. (*Keeling v. Brown*, 5 Ves. 359.)

But, admitting a trust in this case, clearly the remedy is not at law, but only in equity. (*Gorton v. Dyson*, 1 Neil Gow, 78. *Webb v. Jiggs*, 4 M. & S. 113.) The importance of confining the remedy to a Court of Equity, in all cases of a general legacy, was ably vindicated in *Deeks et ux. v. Strutt*, (5 T. R. 690.)

It may be said that *Kelsey* has paid a part of this claim ; but he was one of the executors ; and it will be intended that he paid in that capacity. If not so, a payment in ignorance of his rights should not conclude him.

C. H. Ruggles, contra. It is well settled that assumpsit lies against a devisee of land, upon his express promise to pay a legacy chargeable on the land, or on the devisee in respect to the land. (*Livingston v. The Exrs. of Livingston*, 3 John. Rep. 189. *Beecker v. Beecker*, 7 id. 99. *Van Orden v. Van Orden*, 10 id. 30.)

1. The legacy to *Deyo's* wife was intended by the testator to be paid by the defendant, in consideration of the devise made to him of the whole real estate ; and he became chargeable with it by entering on the lands devised. The testator directs that his debts be paid out of his personal estate, but does not direct the payment of his legacies out of that fund. He bequeaths to his wife all his personal estate, after payment of his debts, except what was bequeathed to his daughter *Sarah*. The rights and privileges bequeathed to his wife are to continue undisturbed during the term of her natural life ; and thus the personal fund is locked up till

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

UTICA,
Aug 1824.

Kelsey
v.
Deyo.

her death ; and yet one half the legacies are payable within two years after the testator's death. He farther declares, that after the decease of his wife, what remains of his personal estate shall be equally divided among all his children ; thus disposing of the whole, and leaving nothing in the hands of his executors by which legacies could be paid. Upon the bequest of the personal property to the wife, there are several restrictions—the previous payment of debts ; the limitation of interest to her natural life ; and the exception in favour of *Sarah*—but the payment of legacies is not mentioned or provided for ; though the first payment would, in all probability, fall due during her life. He directs this legacy to be paid by the defendant, individually, and his heirs—not by the executors, or by the defendant as one of them ; and the direction to pay the legacy follows immediately upon the devise of the real estate. It is connected with it, not only in the same clause, but in the same sentence. The devise to the defendant excepts such rights and privileges as have theretofore or shall thereafter be granted by the testator. This language is broad enough to embrace the legacies. The executors had no interest in the personal property, except for the payment of debts.

But it is said the testator understood himself ; that when he meant the real estate should be charged, he said so ; that, therefore, nothing is left for implication ; and the provision for the money due to the heirs of the testator's father is appealed to in proof of this. This was the last disposing clause in the will. It related to a debt doubtful as to its ever being demanded, its amount, and the time when it would become due ; and having already provided as to his debts in general, that they should be paid out of his personal estate, it required an express order to make the exception. This demand might lie dormant till after the wife's death ; and it was very proper to guard against the implication that it was payable out of the personal property for this reason. That was not the case with the legacy in question, and no such distinction was necessary.

True ; it is a general rule of law, that legacies are payable first out of the personal estate, and that a general charge of

real estate does not exempt the personal. (*Toll. L. E.* 410). But, we answer, the personal estate was never charged for the payment of these legacies; and a distinguishing characteristic of the cases cited to this point on the other side is, that in all of them the legacies were *left*, or *ordered* to be paid by the executors, or by trustees. No case is cited of a devise directing the devisee to pay, or making the legacy depend either expressly or by construction upon the acceptance of the devise, where the real estate was holden exempt, or postponed to the personalty. In the case so much relied on, of *Ancaster v. Mayer*, (1 *Br. Ch. Cas.* 462 & 3) a term was raised to two executors to pay debts and legacies; the personal estate was given to him who should take the freehold; and the executors were ordered to pay debts and legacies by such methods, ways and means, as they should be advised, &c.

It then becomes a question, what is the mode of expression to give the personal estate exempt from the payment of debts, (or legacies) when the rule of law is, that such estate is first liable. "Therefore, if there be a *declaration plain*, or *manifestation clear*, so that it is apparent on the face of the whole will that there is such a plain intention, *the rule then is not to disappoint but to carry such intention into effect.*" (*id.*) In *Watson v. Brickwood*, (9 *Ves.* 454) it was held "now too late to say that it is not open to the Court to collect from the whole will an intention to exonerate the personal estate, *though that intention is not expressed in any positive or conclusive words.*" In *Webb v. Jones*, (2 *Br. Cas. in Ch.* 60) it is said, "the general rule is very clear, that the personal estate is the fund first liable, and that the testator cannot exonerate it without first substituting another fund. *But there is no magick in words.* No peculiar form of expression is necessary, in order to exonerate the personal estate. *If the intention of the testator be evident to exonerate the personal estate, it must be exonerated.*" (*Livingston v. Newkirk*, 3 *John. Ch. Rep.* 312. *Lupton v. Lupton*, 2 *id.* 614, *S. P.*)

It is said, that where the personal estate is not expressly exempted, the testator's intention must be manifested by a specifick bequest of the personal property, in order to ex-

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

empt it. For this, *Ld. Inchiquin v. French*, (*Ambl.* 33. 37) is cited. This case is not law. The position is found nowhere else, and it is in contradiction to the other cases. Where such a specifick bequest exists, it is, to be sure, a very satisfactory ground of exception; but not the only ground. But take the rule as laid down in *Ambler*. What is meant by a specifick devise of personal property? Any thing which indicates the testator's intent to give away the whole of it, without subjecting it to the payment of legacies. (*Wainright v. Bendlowes*, 2 *Vern.* 718.) In this case, *I. Bendlowes* devised his fee farm rents to be sold for the payment of his debts, and the surplus to his brothers, *John* and *Philip*, and his brother-in-law, *Wainright*; and willed that his household goods should go along with his house; and then bequeathed the rest and residue of his personal estate to his sister, *Wainright*, and made her his executrix; and the personal property was retained by his sister, although executrix, and exempted from the payment of debts. This was held a specifick bequest of all the personal property except the household goods. The bequest under consideration is specifick, within the rules of law, according to the case cited, and other authorities. (2 *Fonbl.* 294, *B.* 3, *ch.* 2, *s.* 5. *id.* 285, *B.* 3, *ch.* 2, *s.* 1, note (a). *Adams v. Meyricke*, 1 *Eq. Cas. Ab.* 271, case 13.) Then *Kelsey's* personal property being specifically bequeathed, the intention to exempt it is clearly manifest, within the rule laid down on the other side.

2. Part payment of the legacy is conclusive evidence of a promise to pay the whole. (*Van Orden v. Van Orden*, 10 *John.* 30.)

3. But if the real and personal assets should be marshalled, part payment is evidence of the exhaustion of the latter, and binds *Kelsey*, whether there be personal estate or not. In *Pelletreau v. Rathbone*, (18 *John.* 31) there was no promise, no part payment, nor any other thing equivalent to a promise.

Sudam, in reply. Both Courts of law and Equity profess to follow the intention of the testator in the construction of wills. If this question were now raised for the first time, or

rested on inference and conjecture, the other side might be right. But there are certain settled rules to which the Court will adhere, because the authorities are a safer guide than individual opinion, and better answer another object of the law, which is certainty. Now it is perfectly well settled, that the personalty is never exempt, unless expressly declared so by the will, or by something which is plainly equivalent to an express declaration. This was settled as long ago as *Ld. Thurlow's* time. If so settled, the Court cannot get by this doctrine here. The giving real estate and legacies generally, and making a single legacy a charge upon the real estate at the close of the will, render the authorities directly applicable. It is said that one half the legacies were to be paid within one year after the testator's death—possibly before the widow's decease—and an implied charge upon the real estate is deduced from this circumstance. But no matter when the general legacies are payable. They will not take preference of the specifick bequest of the personal property. They must wait till there is enough of the personal estate to satisfy them, and if this is never the case, they must fail; for they are considered as a debt created and charged upon the personalty. This brings us back to the terms of the will, and an examination of the cases. I refer particularly to those cited by the Chancellor, in *Lupton v. Lupton*, (2 *John. Ch. Rep.* 623). The charge must precede the devise, in order to subject the real estate. This is the conclusion to which he comes, from all the cases. Could a legatee have pursued this real property, in the hands of a *bona fide* purchaser? Was this legacy an incumbrance which attached and adhered to the land? I think no lawyer would go to that extent. Yet if the argument on the other side be right, here is a lien upon this land, which Equity would follow, and enforce, in whose hands soever it might come. *Caveat emptor* must be applied to a purchaser. After satisfaction of the specifick legacy to *Sarah*, the bequest over is general to the wife. This is improperly called a specifick legacy. It is not of specifick things, though it may have sometimes been so considered, when another fund has been created for the payment of debts, and widows are

UTICA,
Aug. 1824.Kelsey
v.
Deye.

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

concerned. The whole doctrine of English Equity is against its being so considered in this case.

per SAVAGE, Ch. J. Two questions are presented to the Court, for their decision :

1. Whether an action at law lies for a legacy charged upon land ?

2. Whether, from the whole will, it was clearly the intention of the testator to discharge his personal estate from the payment of the legacy in question, and charge it upon the realty ?

The first question was not directly raised on the argument, though we were referred to several English cases, which question the plaintiff's right to a remedy at law. It has been settled, that without a promise to pay a legacy charged upon the realty, an action does not lie ; and, that it will lie for any general legacy, even when there has been a promise, the English authorities are not uniform. The first case appearing in our own reports, is *Beecker v. Beecker*, (7 *John. Rep.* 99.) That was an action for an annuity charged on land devised to the defendant, in which there was an express promise to pay. *Kent*, Ch. J. reviewed the English cases, and decided in favour of the legatee, on the authority of *Atkins v. Hill*, (Comp. 284) *Hawkes v. Saunders*, (*id.* 289) and *Doe v. Guy*, (3 *East*, 120) and distinguished the case from that of *Deeks v. Strutt*, (5 *T. R.* 690.) The next case is *Van Orden v. Van Orden*, (10 *John.* 30.) In this case there was no express promise to pay, but the defendants had paid part, the estate left by the testator being sufficient to pay all the debts and legacies. The case was admitted not to be within that of *Beecker v. Beecker*, but it was precisely within the case of *Deeks v. Strutt*. The Court considered the payments made by the defendants to the plaintiff as conclusive evidence of an express promise to pay, so as to entitle the plaintiff to recover. The case of *Deeks v. Strutt* is, therefore, overruled, and with it all the corresponding class of cases.

In the present case there was no direct evidence of an express promise to pay, but payments have been made from time to time, from which, according to the case last quoted, an

express promise may be inferred. The plaintiffs in the Court below were, therefore, entitled to recover, unless, from an examination of the will, it appears that the legacy in question was to have been paid out of the personal estate. The rule for marshalling assets towards the payment of debts is correctly laid down by Chancellor Kent, in *Livingston v. Newkirk*, (3 John. Ch. Rep. 312.) He there says, "It is too well settled to be questioned, that the personal estate is to be first applied to the payment of debts and legacies, and that a mere charge on the land will not exonerate the personal estate, nor any thing short of express words, or a plain intent in the will of the testator."

UTICA,
Aug. 1824.

Kelsey
v.
Deyo.

In *Ancaster v. Mayer*, (1 Br. Ch. Cas. 462) Lord Thurlow says, "Where there is a *declaration plain*, that shall stand in lieu of *express words*." Again: "If there be a declaration plain, or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution." What, then, was the intention of the testator?

1. He first directs his debts to be paid out of his personal estate.

2. He gives his wife, *Lucretia*, all his personal estate, after payment of his debts, and a legacy to one of his daughters, and goes on to make other provision for his wife upon his homestead farm.

3. After his wife's death, what remains of the personal property is to be divided equally among his children.

4. The following clause: "I also will, devise and bequeath, to my son, *Nathaniel Kelsey*, all my real estate, to him and his heirs forever, excepting such rights and privileges as have heretofore or shall hereafter be granted by me respecting the premises: and my will and desire is, and I do hereby order and direct, that my son, *Nathaniel Kelsey*, or his heirs, pay the following legacies:" Then follow the legacies, of £100 each, to his three daughters, one of whom, (*Julia*) was a plaintiff in this cause below. He adds, "One half of each of the above legacies to be paid within two years after

UTICA,
Aug. 1824.

Kelsey
v.
Deyp.

my decease, and the other half to be paid in two years after the decease of my wife, without interest." He next directs a certain sum, if to be paid at all, after the death of *Daniel Kelsey*, to be paid out of the real estate ; and makes his wife executrix, and *Nathaniel Kelsey* and his son-in-law, *Moses Woolsey*, his executors. Did the testator intend that these legacies should be paid from his personal estate ? or was it his intention that *Nathaniel Kelsey* should pay to each of his sisters £100, as their right in the farm which was devised to him ? It is to be observed, that the personal estate was all given to the widow during her life. She might have lived 20 years ; and yet one half the legacies was to be paid in two years after the testator's death. Out of what fund ? The personal property ? That was in the hands of the widow. What other fund had *Nathaniel* ? The farm. Again : by whom were these legacies to be paid ? By the executors ? No : by *Nathaniel Kelsey*—not as executor. If the legacies were to be paid out of the personalty, we must suppose that the testator, in his last moments, was mocking his wife with the appearance of making provision for her, by giving her all his personal property, when, in fact, he intended to give her none of it. It has been well remarked by Lord *Thurlow*, I think, that such a construction should be given to wills as will make the testator's intentions honest. Would it be honest for a husband thus to deceive his wife ? Again : one legacy is given to the wife of one of the executors. Why is the legacy to be paid by *N. Kelsey* ? If the legacy were good, and to be paid out of the personal estate, the husband of *Abigail Woolsey* might retain the money in his own hands, as executor, to pay his wife's legacy. The only part of the will calculated to create any doubt is the last clause ; and even that may admit of a construction, that all the payments by *Nathaniel Kelsey* are to be made out of the real estate. But admitting it to apply to the sum contingently spoken of, it is not sufficient, in my judgment, to change the whole complexion of the will.

I am, therefore, of opinion, that the legacy to the plaintiff, *Julia*, was a charge on the real estate devised to the plaintiff in error ; and that, by paying part, he gave conclusive evi-

dence of a promise to pay the whole ; and, consequently, that the judgment of the Common Pleas should be affirmed.

Judgment affirmed.

UTICA,
Aug. 1824.

Raymond
v
Merchant.

RAYMOND against MERCHANT.

ASSUMPSIT. Declaration on a negotiable promissory note, made by the defendant and payable to the plaintiff, dated *November 3d*, 1814 ; for \$130. Plea, 1st, *non-assumpsit* ; 2. that after making the note, &c. to wit, on the 26th day of *December*, 1816. at the city of *Albany*, *Stephen Merchant* was the defendant's creditor ; that the defendant was then and there imprisoned and had been imprisoned for 60 days and upwards, upon execution, in a civil action ; that *Stephen Merchant*, being then and there apprehensive that the estate or effects of the defendant would be wasted or embezzled, did apply to *Phillip S. Parker*, who then was, and from thence hitherto hath been, &c. Recorder of the city of *Albany*, for relief according to the " act for giving relief in cases of insolvency," passed *April 12th*, 1813, (going on and setting forth a regular discharge of the defendant, under the 9th section of that act, (1 R. L. 464-5.) on the 28th *February*, 1817, by *Mr. Parker*, Recorder, from all debts, &c.)

Replication, that the note declared on, was, at the day it bore date, executed at *Bennington*, in the state of *Vermont* ; and that, at its date, and ever since, the plaintiff was and yet is an actual resident of that state.

Rejoinder, admitting the truth of the replication ; and averring that after the passage of the act under which the

A discharge under the act for giving relief in cases of insolvency, (1 R. L. 464, 5, s. 9.) passed *April 12th*, 1813, is a bar to an action on a contract made in this state subsequent to that day.

A promissory negotiable note given for an antecedent debt, is not absolutely an extinguishment of that debt ; but an action may still be maintained for the original consideration, provided the note be lost, or produced and cancelled at the trial.

Where such antecedent debt was contracted in this state, subsequent to the act for giving

relief in cases of insolvency ; and a negotiable note was afterward given for that debt in the state of *Vermont* ; held, that a discharge under that act was a bar to an action on the note, the original consideration of which might be inquired into in reference to the discharge.

UTICA,
Aug. 1824.

Raymond
v.
Merchant.

discharge was granted, to wit, on the 29th October, 1814, the defendant was indebted to certain merchants then residing in the city of *New York*, partners, by the name of *Little & White*, in \$232,70, for goods, &c. sold him by them; that he paid them \$100, and requested the plaintiff, who was then at *New-York*, to pay the residue; that it was agreed there, between the plaintiff and defendant, that the former should pay or secure \$132,70; and that the defendant should secure or pay the same sum to the plaintiff; that the plaintiff, accordingly, at *New-York*, did pay or secure the \$132,70; and that afterwards, at *Bennington*, in *Vermont*, the defendant executed the note declared on, for and on account of that sum; that this was the sole ground and consideration of his note.

General demurrer and joinder.

S. A. Foot, in support of the demurrer. We conceive it to be immaterial, whether the debt in question arose in or out of this state. If there is any thing in such a distinction, the note is evidence that it arose out of the state. Being a negotiable note, it extinguished the debt for the purposes of this question. The original consideration cannot be set up and sued for, till the note is produced and cancelled. Though it may not be a technical extinguishment, yet it is a suspension, (*Holmes & Drake v. D'Camp*, 1 *John. Rep.* 34,) which is the same thing for the purposes of this question. It may be said that we had an option to go upon the note or not; for we might have given it up. This is true; but it is equally so that we may elect and have elected otherwise. By taking the note, the nature of the original transaction is changed, and we ought to have the benefit of our security as we have drawn it. There is an attempt in the rejoinder to make the act of giving the note, the fulfilment of a previous agreement. This can make no difference. The rejoinder shows that the true consideration of the note was the *New-York* debt for goods sold.

I. Hamilton, contra, relied upon the case of *Wyman v. Mitchell*, (1 *Cowen's Rep.* 316,) where, to a plea of an insol-

vent's discharge in bar of a judgment obtained in this state since the insolvent act was passed. The Court allowed the plaintiff to shew in reply, that the consideration of the judgment arose in *Massachusetts*, before the act; and held that the consideration was not merged in the judgment. *A fortiori*, he said, the note is not a merger. It is only in equal degree with the debt it was given to secure: He also referred to *Mather v. Bush*, (16 *John.* 243,) and several of the cases there cited. He said the defendant resided in this state, and the contract and ground of the debt wholly arose here. This is enough. The consideration is an essential part of the contract. Without this the note would be a nullity; and it is perfectly well settled, that where a promissory note is given for a precedent debt, it is no extinguishment. The payee may sue upon the original debt; waiving the note altogether.

UTICA,
Aug. 1824.
Raymond
v.
Merchant.

Foot, in reply, said it is true, the consideration of a judgment may be inquired into. It is a judicial act, an act of the Court which should not preclude the party from going back and availing himself of the ground of the judgment. The present is an attempt to invalidate the party's own act, by which the nature of the original contract was changed. What is the contract upon which we sue? A promissory note founded on good consideration. Is not the note a contract? It is said, a consideration is essential to a contract. This is conceded; but are the consideration and contract identical? Suppose the consideration had been before the act—the note afterwards—the whole in this state; could we go back to the consideration, and say the note is not discharged? A breach of a marriage promise forms a good consideration for a note; though it is not the subject of an insolvent discharge. So a moral obligation is a valid consideration for a promise, but it is not, therefore, the contract itself. Had we sued on the implied promise arising from the payment, it might have been different. But the action is on the special agreement, and this alone should be looked to.

UTICA,
Aug. 1824.

Raymond
v.
Merchant.

Curia, per SAVAGE, Ch. J. Under the pleadings in this case, and the previous decisions of this Court, (*Mather v. Bush*, 16 John. 233, *Matter of Wendell*, 19 John. 153,) the question raised is, whether the note executed in Vermont be an extinguishment of the previous contract, or indebtedness on which the note was predicated. The principle adopted by this Court, in *Holmes v. D'Camp*, (1 John. Rep. 36-7,) is, that a negotiable note is not absolutely an extinguishment of an antecedent, simple contract debt; but that the plaintiff may recover upon the original consideration, provided he shews the note to be lost, or produces and cancels it at the trial. Had the plaintiff declared on the original consideration, a plea that a note had been given for it, would have been bad on demurrer. The giving the note must be taken advantage of on the trial.

I think, therefore, that as the contract was made in the state of New-York, and is not extinguished by the note given in Vermont, the discharge is a good defence. The defendant must have judgment.

SUTHERLAND, J. (*dissenting.*) The demurrer in this case, appears to me to be well taken. The contract between the parties is the note on which the suit is brought. All previous contracts or agreements in relation to the subject matter of the note were merged in it. The plaintiff could not have recovered upon the original consideration of this note, as long as the note was in being. He would have been obliged either to have shown that it was lost, or to have produced and cancelled it at the trial. (*Holmes v. D'Camp*, 1 John. Rep. 34. *Angel v. Felton*, 8 id. 115.) The final agreement between the parties, is the contract; and the law of the place where that agreement is made, is to govern its construction, unless it appear upon its face to have been made with reference to the laws of some other place, and with a view of being executed there. It may be that the note was not given in New-York, for the very purpose of avoiding the operation of our insolvent laws, and that by the express agreement of the parties.

The case of *Wyman v. Mitchell*, cited by the counsel for the defendant, is very distinguishable from this. That was an action of debt upon a judgment obtained in this state. The defendant pleaded his discharge under one of our insolvent acts. The plaintiff replied, stating the contract upon which the judgment was obtained, to have been made in *Massachusetts* before the passing of the act under which the defendant was discharged. To this the defendant demurred, and we overruled the demurrer on the ground that the judgment upon which the suit was brought, *was not a contract between the parties, but only evidence of a preexisting contract*; and that it was proper to show when and where that contract was made. A judgment is not a voluntary agreement between the parties. It can never, therefore, be said, that a judgment is a contract entered into with reference to the laws of the place where it is obtained, and that those laws are to be presumed to have been within the contemplation and intent of the parties. We, therefore, permitted the plaintiff to go back until he came to an agreement or contract, and no farther. We held, expressly, that the consideration of such agreement or contract was not to be inquired into, with a view of shewing that it arose at a different time or place from the contract itself.

I am accordingly of opinion, that the plaintiff should have judgment.

Judgment for the defendant.

UTICA,
Aug. 1824.
Clark
v.
Bush.

CLARK & TUBBS, executors of BARNEY, against BUSH, impleaded with M'CRACKEN.

ASSUMPSIT upon a note given by the defendants to the testator of the plaintiffs, dated *November 2d, 1815*, for \$2000, payable *October 9th, 1820*, with interest, to be paid annually. *Bush*, one of the defendants, pleaded the general is-

A bond or covenant by the creditor to save harmless and indemnify the debtor

• UTICA,
Aug. 1824.

Clark
v.
Bush.

against the
debt, operates
as a release of
the debt.

A and B
gave a note to
C, of \$2000;
and then B
and C became
bound in the
penalty of
\$3000, to in-
demnify A a-
gainst all the
partnership
debts due
from A and B,
the \$2000,
debt due to C,
being one of
them; and C
paid under
this bond to
the amount of
the penalty by
way of indem-
nifying A a-
gainst other
debts due from
the firm of A
and B, and
then brought
his action a-
gainst A upon
the note to C.
Held, that he
should recover;
for he
shall not be
holden to pay
beyond the
penalty of his
bond; more

especially as he was a mere surety; and the bond shall not operate as a release of a debt which he could not be called upon to pay.

A surety is not liable beyond the penalty of his bond.

The rule seems to be the same as to the principal.

The *English* and *American* cases upon these two heads considered.

sue, payment and a release; to which pleas was also sub-joined a notice that there would be given in evidence on the trial, a release of the testator of all debts, dues, claims and demands, of what name or nature soever existing against the firm of *Bush & M^cCracken*, with the necessary and proper averments, &c.; also that the testator, in his life time, together with *M^cCracken*, the defendant, executed to *Bush*, a bond, bearing date *October 1st, 1816*, in the penal sum of \$3000, with condition that if *Barney*, (the testator of the plaintiffs) and *M^cCracken*, their heirs, &c. should well and truly, at all times, indemnify and save harmless, *Bush*, his heirs, &c. from and against all debts, dues, claims and demands, of what name or nature soever, existing against the firm of *Bush & M^cCracken*, (the same before named) including as well all debts and demands then due by and from the firm, as all contracts theretofore made by them in and about the firm of *Bush & M^cCracken*. by means of which contracts *Bush* might, in any manner thereafter, be made liable; then, &c. else, &c.

On the plea of payment, the plaintiffs took issue; and to the plea of a release they replied *non est factum*.

The cause was tried before (the late) Mr. Justice *Yates*, at the *Washington* Circuit, *June 14th, 1822*. The plaintiffs proved the note declared on, upon which was endorsed \$140, *November 2d, 1816*, for interest. The balance due being \$2807.33.

The defendant, *Bush*, then produced and proved the bond set forth in his notice.

The counsel for the plaintiffs then produced and proved the two following receipts or instruments in writing, signed by *Bush*, and insisted that the penalty of the bond being satisfied, it did not operate as a release of the plaintiff's de-

UTICA,
Aug. 1824.

Clark.
v.
Bush.

mand, or in any manner bar their right to recover. The receipts were as follows: "Whereas judgment was obtained in the Court of Common Pleas of the county of Washington, in favour of *William A. Moore*, against *Amos T. Bush*, in May term, 1818, which judgment was obtained on a demand against the late firm of *Bush & McCracken*; damages, \$1417,16, and costs \$28,36, making in all, as specified in the execution issued thereon, \$1445,52, the interest thereon up to this 21st June, 1819, \$106,80—whole amount \$1552,32, the above judgment having been obtained on demands against which the said *Amos T.* was indemnified by a certain bond given by one *James Barney*, (deceased) and said *Charles McCracken*, to said *Amos T.* bearing date the 1st October, 1816, as by reference to said bond will fully appear; and such proceedings being had whereby the executors of the said *James Barney*, deceased, have agreed to settle the above sum of \$1552,32. And I, the said *Amos T. Bush*, do hereby certify that I have this day received of *George Clark*, of *Fort Ann*, one of the executors of the said *James Barney*, deceased, the above sum of one thousand five hundred and fifty two dollars and thirty two cents, on the account of the said bond, and which said bond is so far cancelled as may relate to said demand above in part specified. Dated 21st June, 1819. *Amos T. Bush.*" "Received, *Fort Ann*, 19th May, 1820, of *George Clark*, one of the executors of the within named *James Barney*, deceased, on the within mentioned bond, the further sum of one thousand four hundred forty eight dollars and thirty nine cents, making in all paid to me by said *George Clark*, as one of the executors as aforesaid, in virtue of said bond, the sum of three thousand dollars, and 77¢.

Amos T. Bush."

The counsel for the defendant, *Bush*, insisted that he had shown enough to defeat the right of action, and that, therefore, the plaintiffs ought not to recover. His honour, without deciding the question, directed that a verdict should be

UTICA,
Aug. 1824.

Clark
v.
Bush.

found for the plaintiffs for \$2807, with leave for the defendant to make a case, and to turn the same into a bill of exceptions if he pleased ; and the jury found accordingly.

R. Weston, for the defendant, made the following points :

1. The bond was in the nature of a release to *Bush*, of all demands due from *Bush & M^cCracken*, to *Barney*, the testator. (a)

(a) *Cuyler* v. 2
Cuyler, 2
John. Rep.
186. *Lacy* v. 2
Kynaston, 2
Salk. 574.
Phelps v. 8
Johnson, 8
John. Rep. 58.

2. The bond being for indemnity against all these demands, was not satisfied by payment of the penalty, especially after the death of *Barney*.

3. The demand of the testator, having been once released by the operation of the bond, could never be revived by payment of the penalty after the death of *Barney*.

Z. R. Shipherd, contra. It is a well settled rule, that paying the penalty of a bond discharges the condition. If this had been a mere covenant to save *Bush* harmless, it would be different ; but the obligors' liability is limited by a penalty. How, then, can it operate as a release of sums beyond the amount of the penalty. Here is no circuitry of action to be guarded against ; and the construction contended for would be grossly inequitable. No action could be maintained upon this bond by *Bush*, for any debts which he might pay to third persons, and the note in question stands on the same footing. The Court should look at the intent of the parties in every contract. Is there a doubt that they intended to limit the liability of *Barney* to the penalty ? If this be not so, there are no terms by which the parties can limit themselves. Upon what principle can this defendant say to the payees, " You shall take up the note which I owe to you ?"

Weston, in reply. If this writing had been a covenant, secured by a penalty, there is no doubt the covenantee might have disregarded the penalty, and proceeded for all his damages upon the covenant. The difficulty, then, is one of form merely. There is no real difference, whether the defeasance be underwritten in a bond, or included in a cov-

enant. The equity is the same ; the remedy of the obligor is suspended ; and if the bond operates as a release for a moment, it is not denied (indeed it will not admit of discussion) that it will always continue so. Perhaps we could not maintain an action of debt. The forms of law would be against us ; but the question is not whether we are to have an action : it is whether we are to retain what we already have in our hands. This is like a sum paid by an infant on his promise, or an insolvent upon a debt barred by his discharge, or by a debtor, the demand against whom is barred by the statute of limitations. The forms of law are against the remedy to compel either ; but the money, when once paid, cannot be recovered back.

UTICA,
Aug. 1824.

Clark
v.
Bush!

Curia, per SAVAGE, Ch. J. (After stating the facts.) It is contended by the counsel for the defendant *Bush*, 1. That the bond operated by way of release ; 2. That its operation is not changed by the payment of the penalty ; 3. That payment of the penalty was not a discharge of the liability of *Barney*.

If the condition of the bond was not discharged by payment of the penalty, then the bond must operate by way of release to prevent circuitry of action ; for it would be useless for the plaintiffs to recover on the note, if the defendant *Bush* might turn round and recover the whole amount back on the bond. (2 *John. Rep.* 186. 8 *id.* 58, 59.)

On the question whether the obligor in a bond can be compelled to pay more than the penalty, the decisions have not been uniform. In *Lowe v. Peers*, (4 *Burr.* 2228,) the questions were, 1. Whether the £1000 mentioned were stipulated damages ; 2. Whether the contract was lawful. Lord *Manfield*, in giving his opinion, says, "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty and recover the penalty ; (after which recovery of the penalty he cannot resort to the covenant ; because the penalty is to be a satisfaction for the whole ;) or if he does not choose to go for the penalty, he may proceed upon

UTICA,
Aug. 1824.

Clark
v.
Buah.

the covenant, and recover more or less than the penalty *toties quoties*." This dictum of *Ld. Mansfield* was not called for by the case, nor is any adjudged case cited. It is, however, considered good law by *Epinasse* in his law of *nisi prius*. (2 *Esp. N. P.* 279.) In *Branguin v. Perrot in the C. P.* (2 *Bl. Rep.* 1190,) the defendant moved to pay into Court the penalty of the bond, the condition being to indemnify a parish against the maintenance of a bastard child. This was opposed on the ground that the action was for a single breach; after which the penalty should remain to answer subsequent breaches, *in infinitum*. But *De Grey*, Ch. J. said, "This is really so plain a case that one knows not what to say to make it clearer. The bond ascertains the damage by consent of parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more?" The other Judges, *Gould*, *Blackstone* & *Nares*, concurred. In *White v. Sealy et al.* (*Doug.* 49,) the defendants gave a bond in a penalty of £600, conditioned for the payment of a yearly rent by another person of £570. Two judgments had been recovered on the bond; and to the third action the defendants pleaded the first judgment in bar. The question was, whether the bond was a standing security for the rent for the whole term of 22 years, or only to the amount of the penalty. *Buller*, J. at first, thought that the plaintiff might assign breaches under the statute and recover more than the penalty; but finally concurred with *Ld. Mansfield* & *Ashhurst* that the defendants were liable only for the penalty. *Ashhurst*, J. thought that though a recovery beyond the penalty might be right as to the principal, it would be inequitable as against the sureties. Afterwards, in *Lonsdale v. Church*, (2 *T. R.* 388,) the question arose on a bond executed by the defendant and others. The defendant, as receiver of the harbour dues of *Whitehaven*, entered into three bonds of £2,000 each, conditioned to account for all sums received by him. He moved for a stay of proceedings on the payment of the penalty of two of the bonds. *Buller*, J. declared that he was not satisfied with the decision in *White v. Sealy*; and cited *Elliot v. Davis*, (*Bunb.* 23,) *Colins v. Collins*, (*Burr.* 820,) & *Holdipp v. Otway*, (2 *Saund.* 106) where the plaintiff had been allowed to recover more

than the penalty by way of damages, being the interest due by the condition of the bond, or costs. And the Court refused a stay of proceedings. Another case (*Knight v. Maclean*, 3 Br. Ch. Rep. 596) came before *Buller*, J. sitting for the Lord Chancellor, and exceptions were taken to the report of the master, because in calculating interest on a bond for the payment of money, he had only computed interest to the amount of the penalty; and *Buller* allowed the exception, deciding that the master should have gone on with the interest, notwithstanding it might exceed the penalty; and he said that *White v. Sealy* went upon the defendants' being sureties. But *Ld. Thurlow*, the Chancellor, on a re-argument, overruled the exception, on the ground that the penalty was the extent of the obligor's liability. He had just before decided the same thing in *Tew v. The Earl of Winterton*, (3 Br. Ch. Rep. 490.) The question came again before the K. B. in *Wilde v. Clarkson*, (6 T. R. 303,) on a bond to indemnify the parish against the maintenance of a bastard child. The motion was, that satisfaction should be entered on payment of the penalty; and the case of *Lonsdale v. Church* was cited against it. But *Ld. Kenyon* said "I cannot accede to the authority of that case. According to that, an obligor who became bound in a penalty of £1000, conditioned to indemnify the obligee, may be called upon to pay £10,000, or any larger sum however enormous. In actions on bonds, or any penal sums for performance of covenants, the act (8 & 9 W. 3. ch. 11, s. 8,) says there shall be judgment for the penalty; and that the judgment shall stand for further breaches: but the obligor is not answerable in the whole beyond the amount of the penalty." The authority of this last case, and the corresponding class of cases was expressly recognized by the Court of K. B. in *McClure v. Dunkin*, (1 East, 436,) and by the C. B. in *Heford v. Alger*, (1 Taunt. 218.)

The few American decisions that are to be found are also at variance. In *Tunison v. Cramer*, (*South. Rep.* 498,) an intimation is given, that there are cases in which a recovery may be had beyond the penalty; but it was held, in terms, that this could not be against a surety. In *Graham v. Bick-*

UTICA,
Aug. 1824.

Clark
v.
Bush.

UTICA,
Aug. 1824.

Clark
v.
Bush.

ham, (4 *Dall.* 149, 4 *Yeates' Rep.* 32, S. C.) it was decided that where the penalty is not in the nature of stated and ascertained damages, the injured party may recover beyond the penalty. That case was on a contract not under seal for the transfer of stock. In *Harris v. Clap*, (1 *Mass. Rep.* 308,) the same thing was holden of a bond, and against a surety, *Sedgwick*, J. dissenting. But in *Payne v. Ellzey*, (2 *Wash. Rep.* 143,) in debt on a prison bounds bond, against the surety, the Court of Appeals in *Virginia* decided that though the plaintiff may recover less, he can not recover more than the penalty; and they lay this down as a general rule, without distinguishing between a surety and principal. In *United States v. Arnold*, (1 *Gall. Rep.* 348, 360.) *Story*, J. remarks, "Noticing some contrariety in the books, I think the true principle supported by the better authorities is, that the Court cannot go beyond the penalty and interest thereon, from the time it becomes due by the breach." On error, the judgment in that cause was affirmed by the Supreme Court. (9 *Cranch*, 104, 120, S. C.) But the amount to be recovered was not drawn in question.

The weight of these authorities is, I think, in favour of the doctrine, that in debt on bond nothing more than the penalty can be recovered, at any rate, nothing beyond that and interest, after a forfeiture. even against the principal obligor.

But, admitting the doctrine to apply as laid down by *Ld. Mansfield* in *Lowe v. Peers*, and that an action of covenant would lie on the bond in question, in which form *Bush* might recover the whole amount necessary to a complete indemnity, (see also *Winter v. Trimmer*, 1 *Bl. Rep.* 395, and *Perkins v. Lyman*, 11 *Mass. Rep.* 83 ;) still it is clear that this can hold only as to *McCracken*, the principal; but not against *Barney*, who was a surety, and the extent of whose liability is the penalty of the bond. All the cases agree in this, with the single exception of *Harris v. Clap*; and this was against the opinion of *Sedgwick*, J.

The plaintiffs are, therefore, entitled to judgment.

Judgment for the plaintiffs.

UTICA,
Aug. 1824.

Bryar
v.
Willcocks.

BRYAR against WILLCOCKS.

ASSUMPSIT, on a promissory note, *Payee v. Maker*. Plea, *non assumpsit, et non accrevit infra sex annos*.

On the trial, at the *April* sittings in *N. York*, (1822) before Mr. Justice WOODWORTH, the plaintiff gave in evidence the note, dated *February 6th*, 1812, for \$772.04, payable 4 months after date; and proved that the *cap. ad resp.* was issued *December 2d*, 1819, and served on the same day.

Then, to take the note without the operation of the statute of limitations, the plaintiff produced the petition and proceedings of the defendant, under the "act for giving relief in cases of insolvency," passed *April 12*, 1813, (1 *R. L.* 460.) including a sworn inventory of the debt due upon the note at \$853.25, principal and interest.

The plaintiff then gave credit for \$134,79, received *August 19th*, 1817, and rested.

The defendant's counsel moved for a nonsuit, on the ground that no promise had been proved within 6 years before the suit was commenced; but the Judge denied the motion.

The defendant then offered in evidence his discharge under the above act, the reading of which was objected to by the plaintiff's counsel, on the ground that it was under an act passed after the note was given; but the Judge overruled the objection, and the discharge was read in evidence.

This was followed by proof that the above sum of \$134,79 was received by the plaintiff of the defendant's assignee, as a dividend under the insolvent act.

Other evidence was given in the cause, by the plaintiff, which is not deemed material to the questions raised by counsel and determined by the Court.

Verdict for the plaintiff for \$1221,38, subject to the opinion of the Supreme Court upon a case, with leave to either party to turn it into a bill of exceptions or special verdict.

An inventory and affidavit of a debt made by an insolvent before a commissioner, in order to obtain his discharge (which is granted) under the insolvent act, is a sufficient acknowledgment to take the debt out of the statute of limitations.

An action on a note given *February 6th*, 1812, just before the repeal of the insolvent act of 1811, which was repealed *February 14*, 1812, is barred by a discharge under the insolvent act of *April 12*, 1813.

UTICA,
Aug. 1824.

Bryar
v.
Willscocks.

T. A. Emmet, for the plaintiff. To shew that the defendant's inventory and oath took the case out of the statute of limitations, he cited *Smith v. Ludlow*, (6 *John. Rep.* 267, 269,) *Bryan v. Horseman*, (4 *East*, 599,) *Rucker v. Hanny*, (*id.* 604, note(a)) *Truman v. Fenton*, (*Cowp.* 548, per *Ld. Mansfield.*) *Johnson v. Beardsley*, (15 *John.* 3,) *King v. Riddle*, (7 *Cranch*, 168,) which last case he said was in point, as well as the case of *Mountstephen v. Brooke*, (3 *B. & A.* 141.)

That the receipt of the dividend could not operate as an accord and satisfaction, he cited what the Court said in *Johnson v. Brannan*, (5 *John. Rep.* 271,) and *Walkinson v. Inglesby*, (*id.* 386.) *Fitch v. Sutton*, (5 *East*, 230.) *Peyton's case*, (9 *Rep.* 79 b.)

That the insolvent discharge was inoperative, he relied on *Roosevelt v. Cebra*, (17 *John.* 108.)

J. Anthon & J. O. Hoffman, for the defendant, said, the main question arises upon the insolvent discharge. The "act for the benefit of insolvent debtors and their creditors," (*sess.* 34, *ch.* 123) of April 3, 1811, was in force at the date of the note. This act authorized the defendant to apply for and obtain a discharge of equal efficacy with the one under consideration, on his own petition merely; and according to the doctrine laid down in *Mather v. Bush*, 16 *John.* 233,) the statute of 1811 was a part of the contract. The qualification of the defendant's promise was, then, that he should pay the debt unless he should become insolvent, and be duly discharged upon a surrender of his property for the benefit of his creditors. Then came the act of April 12, 1813, by which a new condition was imposed, the assent of creditors, 3 in amount. The defendant complied with this added condition, and was discharged. Now the single question is, whether such a law can be said to impair the obligation of the original contract; and surely this cannot be pretended. The demand of the plaintiff was rather fortified by this farther condition. The case of *Wendell*, (19 *John.* 153) in effect, disposes of this question. It was there held that a contract made in October, 1812, being after the repeal of

the act of 1811 ; and, therefore, in reference to the act of the 3d April, 1801, (1 K. & R. 428) was not discharged by the act of the 12th April, 1813 ; and this upon the express ground that when the contract was made the $\frac{2}{3}$ act was in force ; and the $\frac{2}{3}$ act narrowed the rights of the creditor and impaired his contract. The converse of the proposition follows, in this case, throughout, and we ask the corresponding conclusion. This Court have repeatedly declared that they will not go beyond the spirit of the United States' decisions, which are founded upon the idea of impairing contracts.

UTICA,
Aug. 1824.

Bryar
v.
Willcocks.

Again ; the plaintiff is concluded by receiving the dividend. He has himself taken the benefit of the statute by a very deliberate act. Notice is given ; he proves his debt and is paid. This is an acquiescence in the proceedings by which the creditor should be concluded. He stands in the light of an ordinary petitioning creditor. The only difference is, that the plaintiff consented *after* the discharge ; whereas the petitioning creditor does the same thing *before*. This case is certainly much stronger than that of *Field v. Howland*, (17 John. 85.) The plaintiff's acts of acquiescence are much less equivocal here than in that case. The ground of a discharge under the English bankrupt law, is similar to that which we take here. The receiving a dividend, and signing a certificate, are deemed an election of the creditor by which he is concluded. (*Ex parte Freeman*, 4 Ves. 836. *Grosvenor*, *Ex parte*, 14 Ves. 587.) After the creditor has proved his debt and received a dividend, he is never permitted to proceed, until he first refunds what he has received ; (1 Cooke's B. L. 127, and the cases there cited ;) not a case can be found to the contrary ; and it is a fatal objection to this action, that the plaintiff has not refunded.

The statute of limitations has been so nearly explained away, that Courts feel a disinclination to multiply exceptions to it beyond what has been done already. (*Clemenson v. Williams*, 8 Cranch, 72.) It is now well settled by the decisions of this Court, that the admission of

UTICA,
Aug. 1824.

Bryar
v.
Willecocks.

what will constitute a debt, but at the same time claiming a discharge from it, will not prevent its being barred. (*Sands v. Gelston*, 15 *John*. 511.) The admission insisted on here, depends upon the same principle. It was for the purpose of obtaining a discharge.

Emmet, in reply. The objection that the dividend should be refunded, was not made at the trial ; and it is, therefore, too late to raise that point here. But the English doctrine relied upon does not apply. It is for the benefit of the creditor, who may, by the act of refunding, avoid the discharge, and proceed at law ; but will not be permitted to do this till he places every thing in *statu quo*. Accordingly, if he elect to withhold his sanction to the proceedings under the commission, he must refund his dividend for the benefit of the other creditors. His remedy depends upon his own choice. The law there has full power to discharge ; and the doctrine goes upon that ground. With us, the discharge does not affect the contract. The election which the plaintiff sets up against us as conclusive, is merely an election to give the discharge its true operation, which does not affect the contract beyond the amount of the dividend. *Sturges v. Crowninshield*, (4 *Wheat*. 122,) gives us a right to proceed against the property acquired after the assignment, for the balance beyond the dividend ; though it protects the person of the debtor ; a case very different from the English bankrupt discharge, whose clear operation is to take away all liability, both from property and person. We are bound so far as the law is valid ; but no farther. The case of *Field v. Howland*, does not apply. All the Court say in that case is, that where they would have granted a discontinuance at a previous stage of the action, they will stay execution perpetually, if the application to discontinue is delayed and lost by suffering final judgment. The appeal comes, in such a case, to the equitable powers of the Court. The doctrine of election was not, perhaps, sufficiently considered in that case ; for, surely, nothing is plainer than that election should never bind any farther than the statute can legally operate ; and the withdrawing all opposi-

tion to the discharge in that case was, in law, and, probably, in fact, merely saying, "I will suffer the law to take its course, and discharge the person." It could operate in that way only; and why should an abandonment of opposition, and even the receiving a dividend, or taking that which the creditor cannot have in any other way, bind him to all intents?

As to the question whether the discharge affects the contract, what are the circumstances? The note was given *February*, 6, 1812. It may more properly be said to have been made in reference to the law which had then probably passed both houses of the legislature; and was merely awaiting the sanction of the council of revision, the act of *February* 14th, 1812, which finally passed only 8 days after the date of the note, repealing the act of 1811, and leaving the contract to the operation of the act of 1801. Yet we are told that the law of 1811, interweaves itself in the contract. This should be qualified with the provision that the law continues. Taking the reasoning of the other party, without this qualification, the defendant may say, "I will still have the benefit of the act of 1811, though repealed. It was a part of my contract; and the repeal impairs the obligation of the contract on my side, and for my benefit." But this will not be contended. The act of 1811 is put out of the way by the repeal. It is as if it had never been; and the note stood subject to be discharged by the $\frac{1}{2}$ act only. Then the act of 1813 attempts to impair the contract by granting greater facilities of discharge. If the act of 1813 had repealed the act of 1811, so that the one system had passed smoothly and unbroken into the other, there might be plausibility in the opposite argument.

[WOODWORTH, J. The length you go would make it out that the *new* insolvent act, though it recognize the principle of the old one existing at the time of the contract, and narrow the facility of discharge, would be inoperative, because a *new* and *distinct* act.]

UTICA,
Aug. 1824.

Bryar
v.
Willcocks.

UTICA,
Aug, 1824.

Bryar
v.
Willcocks.

Emmet. Certainly. Upon any other principle, the debtor could never be deprived of the benefit of the insolvent law, as it existed at the time of the contract.

Curia, per SAVAGE, Ch. J. (after stating the case.) The first question is, whether the inventory and affidavit of the defendant is a sufficient acknowledgment to take the debt out of the statute of limitations. It is certainly an admission that the note was due and unpaid, and that will authorize us to presume a promise, unless the acknowledgment is accompanied with expressions which negative that idea. (*Sands v. Gelston*, 15 *John.* 511.)

2. Was the defendant's discharge a bar? The note was given before the repeal of the act of 1811; and, according to the decision of this Court, in *Mather v. Bush*, (16 *John.* 246, 251,) the contract between the parties was, that the note should be paid, unless the defendant became an insolvent debtor within the meaning of the act of 1811, and was duly discharged from his debts according to its provisions. By that act, he was entitled to his discharge on his own petition, and on surrendering his property for the benefit of his creditors. By the repeal of the law of 1811, which took place a few days after the date of the note, the law of 1801 was revived, which requires the assent of $\frac{2}{3}$ of the creditors of the insolvent, before he can be discharged. The repeal of the law, therefore, was favourable to the plaintiff. The act of 1813, materially varied the principle of the law of 1801, in as much as it removed some of the difficulties in the way of obtaining a discharge by substituting the assent of $\frac{2}{3}$ instead of $\frac{3}{4}$ of the creditors.

It cannot be denied, that according to the decisions of this Court, a discharge under the act of 1811, which did not require the assent of any one creditor of the defendant, would, had that act continued in force, have discharged the defendant from the payment of the note in question. Had the law of 1811 been immediately followed by that of 1813, the provisions of which are so much more unfavourable for the defendant, the validity of the discharge would not be disputed; for it is distinctly admitted by the reasoning of

the Court, in the matter of *Wendell*, (19 John. 153,) that had the provisions of 1801 been continued in force, the law of 1813 would have been valid as to contracts entered into under the law of 1801, notwithstanding any revision or re-enactment of those provisions. Does, then, the fact that the law of 1801 was in force for about one year after the date of the note, alter the rights of the parties? The act of 1801 was not in the contemplation of the parties when they entered into this contract. It is true, that while that act was in force, the defendant could not have obtained his discharge without the assent of $\frac{3}{4}$ of his creditors. But had the legislature, on the 12th April, 1813, re-enacted the act of 1811, instead of the $\frac{2}{3}$ act, would not a discharge under the former be valid, as being the precise terms on which it was originally agreed, that the defendant should be absolved from his contract? Most certainly. If, then, the defendant has done all which his contract required, to absolve him from it, and something more, shall the additional difficulties, the assent of $\frac{3}{4}$ of his creditors, imposed on him by the act of 1813, operate to his prejudice, and invalidate a discharge which, without such assent, would have been valid between these parties? I think not; and am, accordingly, of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

UTICA,
Aug. 1824.

Bryar
v.
Wilcocks.

UTICA,
Aug. 1824.

BISSELL *against* HOPKINS.

Bissel
v.
Hopkins.

ON error from the Court of Common Pleas of the county of Livingston. The action in the Court below was trover, for a bay mare, by Hopkins against Bissel, in which the jury found a special verdict, as follows :

The possession of goods continuing in the vendor after sale, is not conclusive, but only, *prima facie*, evidence of fraud as to creditors, and may be explained.

It is a sufficient explanation that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor was in pursuance of some agreement not inconsistent with honesty in the transaction; as where a tenant sells oxen to his landlord, in payment of rent, upon an agreement that the former should retain them to work his farm.

So where D mortgaged a mare, and various other personal chattels, to H, to secure an honest debt, but retained possession of the mare, with

That, before the conversion of the mare, one Jesse Dryer was the owner, and had the possession of her; and on the 1st October, 1819, executed and delivered to Hopkins a certain instrument in writing as follows: “\$274,84½. Whereas I, Jesse Dryer, am indebted to Samuel M. Hopkins in the sum of two hundred and seventy-four dollars and eighty-four and a half cents, being the balance of our accounts this day adjusted; therefore, to provide for the payment and security thereof, I have sold and delivered to the said Samuel M. Hopkins the following goods and chattels, to wit: one bay mare, one cow, three yearling heifers, four grown hogs and five shoats, one stack of hay, a quantity of hay in the barn, four and a half acres of corn on the Tallmadge flats, three acres of corn on the upland in the Simson lot, one acre of potatoes, one half the garden vegetables, one bed and bedding, one bedstead, two sets of chairs, two tables, one cupboard and three pair of fire-dogs, one five pail kettle, part of a set of blacksmith tools. And whereas part of the above articles are growing crops, and cannot now be justly estimated, therefore it is agreed, that the other above articles shall be appraised by Jerome Curtiss, and the corn and other crops shall be estimated at fair value, according to the quantity when harvested; and, thereupon, the condition of this conveyance is, *that upon payment being made in the above articles, or otherwise, to the above amount, the surplus and remaining articles, if any, shall be released to the said Jesse Dryer. Leicester, 1st October, 1819. Jesse Dryer.*” Upon the back of which instrument there was, on the 2d October, 1819, an endorsement made by Jerome Curtiss, as follows :

H's consent, in order to settle and close D's business as constable, he having no other horse, and also retained possession of the other articles to carry on his business; *heid*, a sufficient explanation, and that this was not fraudulent as to creditors.

A bill of sale of chattels, declaring that it is to secure a debt, and providing that, on payment of the debt by the articles or otherwise, the surplus and remaining articles shall be released to the vendor, is a mortgage; and possession of the chattels continuing in the mortgagor, is not evidence of fraud.

"Appraisal of the within goods and chattels.

"The bay mare,	\$60
cow,	15
3 yearling heifers, at \$6,	18
4 grown hogs, at \$4,	16
5 shoats, at \$1,	5
1 stack hay, about 2 tons,	10
4 tons hay in the barn, \$6 ton,	24
1 bed and bedding,	26
1 bedstead, (walnut)	2
2 sets chairs—one at 36s. and one 60s.	12
2 pine tables, \$3,	6
1 pine cupboard,	5
2 pr. fire dogs, (cast)	6
1 five pail kettle,	5
Blacksmith's tools, viz. 1 bellows,	
(old)	\$15
1 stake or beak-horn,	2
4 pr. tongs,	3
1 small sledge-hammer, and 3 hand	
hammers,	6
1 buttress, 4s.—shoeing iron, 4s.—	
clenching iron, 2s.	1,25
3 punches,	50
	27,75

\$237,75

2d October, 1819.

Jerome Curtiss."

That on the 1st January, 1821, *Dryer* executed to *Hopkins* a certain other instrument in writing, which was written on the same paper containing the first, in these words: "1821, Jan. 1. Settled the account of the above to this time, and adjusted the balance at one hundred and forty-six $\frac{11}{100}$ dollars, for which so much of the above property as remains on hand is to remain liable. The bay mare above mentioned is to be delivered to *Malcom M'Naughton*, on demand, but she is intended to remain in said *Dryer's* use for the present, and he is to pay into *Elihu Scofield's* hands, for said *Hopkins*, in good judgments or securities, or to said *M'Naughton's* hands in grain,

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

the amount of fifty dollars, within one month, and on continuing his payments in proportion, the mare is intended to remain with him. *Jesse Dryer.*" That, in the month of *April*, 1817, a book account commenced between the plaintiff and *Dryer*; that settlements were made at different times between them, beside those already mentioned in writing; and that, at the time of the several settlements, including the above written ones, *Dryer* was justly indebted to the plaintiff to the amount of the several sums in the instruments in writing mentioned; that, from the time the plaintiff's account commenced, *Dryer* continued considerably indebted to him, and is now justly indebted to him to the amount of more than \$100; that in *September*, 1817, *Dryer* rented of the plaintiff a tavern stand and small farm, at \$120 *per annum*, and continued therein (but subsequently at reduced rents) till the time the mare in question was sold by direction of the defendant, as hereinafter mentioned; that a large part of the plaintiff's account was for rent, and that, at the time of the sale of the mare by the defendant, more than one year's rent was due from *Dryer* to the plaintiff. That in the month of *November*, 1817, an account commenced between *Dryer* and the defendant, and in *March*, 1820, a considerable balance being due the defendant, he commenced an action against *Dryer*, in the Court of Common Pleas of the county of *Genesee*, and in *September* term thereafter recovered a judgment against *Dryer*, in that Court, for \$91,58, and on the 4th day of *January*, 1821, the defendant caused execution to be issued on his judgment, and delivered to the Sheriff of *Genesee*; that the defendant directed the Sheriff to levy on the mare in question, by virtue of his execution, if possible, while the mare was off the premises rented by *Dryer* of the plaintiff; that, pursuant to such directions, the Sheriff did levy and seize upon the mare, while off the premises, but in the possession of said *Dryer*, and sold the same at publick auction or vendue, in the month of *February*, 1821, at which sale the defendant became the purchaser, and took and led away the mare, and that no rent was tendered or offered to be paid to the plaintiff; that before the sale, the defendant had notice of the plaintiff's claim to the mare, that *Dryer* had been a con-

stable, and had considerable unsettled business, and the special object of leaving the mare in his possession was, (as he had no other horse) to close such business, by which means, as he stated at the time, he hoped to make his payments; that applications were afterwards made to *Dryer* to sell the mare, (being a well known animal, and considered valuable) to which he always, after the pledge, answered, that she was not his, and that the plaintiff had a claim on her, or owned her, and the fact of the plaintiff's claim was publicly known; that the appraisal by *Curtiss* was meant to be a fair one, according to his best judgment; that *Curtiss*, and also *M Naughton*, (being the only persons who were present at, and conversant with the transaction between the plaintiff and *Dryer*) both supposed that no secrecy or concealment was intended, and never themselves had the least reserve upon the subject, or knew of any; that, at the time the bill of sale was executed, *Dryer* was indebted to the plaintiff, and to the defendant and to others, but no judgment or execution existed against him, unless for some trivial amount, till subsequently to the assignment; that the mare remained in *Dryer's* possession from the time when the instrument in writing first above mentioned was executed, till the seizure by the Sheriff; that part of the articles mentioned in the appraisal herein before mentioned, had, from time to time, been delivered and credited to *Dryer* in account, but that *Dryer* made no payment after the settlement of the 1st of January, 1821, except the sum of \$1,50, till the time of sale. And if, &c. then the jurors say, &c. and then they assess the damages of the plaintiff, &c. to \$82,62, &c. And hereupon, &c.

Judgment was for the plaintiff below.

Talcott, (Attorney General) for the plaintiff in error, submitted the following written points or propositions to the Court.

1. The first bill of sale does not *show on its face* that the possession of the horse should be in the vendor; and, therefore, it is *fraudulent in law* against creditors. Whether there was fraud, *in fact*, is not material.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

2. This bill of sale is not a mortgage. There was *no time* for the payment of the debt secured by it—no means pointed out of obtaining payment out of the property. It was an *everlasting* pledge, without delivery of the thing pledged, and, therefore, void. If a creditor can keep other creditors at bay, by such a contrivance, for *one day*, he may for ten years. Leaving the horse in the debtor's possession was, therefore, fraudulent against creditors.

3. Payment of the debt was not the *creditor's object* in taking the bill of sale. *It was* to prevent other creditors from taking the property. The memorandum at the foot of the bill of sale, dated in *January, 1821*, was an attempt, *four days* before the levy, to account for the possession of the property continuing in the *vendor*, and thus change the nature of the sale. The excuse for leaving the horse in the vendor's possession, was not sufficient. A year and half is an unreasonable time to settle his accounts as constable, &c. Both plaintiff and defendant were creditors, and the one obtaining the possession ought to have the property.

4. The defendant's knowing of the plaintiff's claim cannot affect the case; for if the sale *was void*, as against him, his knowledge of such void claim is nothing.

5. As landlord, the defendant in error might have distrained, if any rent was due, and the property having been seized off the premises, he cannot maintain trover for it. Besides, it does not appear that the rent due was that of the last preceding year.

6. At the time of the taking and sale, the defendant in error had no right of possession.

He added, that in examining these propositions, it becomes necessary to look back to the statute of *Elizabeth*. (a) Upon the question, whether leaving property in the hands of the vendor is fraudulent as to creditors, a variety of principles are scattered through the books. Sometimes we are told the Court are to take the question into their own hands—sometimes that it is to be left to the jury—sometimes that such a possession is fraud, *per se*—sometimes that it is so, *prima facie*, only—sometimes that possession is not fraudulent where the sale is conditional—sometimes that it is so, whether the

(a) 13 *Eliz.*
ch. 5, enacted
almost verbatim,
1 R. L.
75.

sale be absolute or conditional. I take this to be the general principle, *that the whole depends upon the intention of the parties*. That intention in this, as in all other cases, is sometimes to be found by the jury, and sometimes it is matter of law, referrible to the Court, and to be presumed not only with, but even against evidence. Thus, Lord Mansfield, in *Worsley v. De Mattos* : (b) "Whether a transaction be fair or fraudulent, is often a question of law : it is the judgment of law, upon facts and intents." *Intent* is either in fact or in law. There are a variety of circumstances from which the law will infer an intent : in others it must be found by a jury, and is then a question of fact. An inference of law is not to be resisted ; and this proposition is well illustrated by the criminal code. One sends a child to a drawer, who takes thence a poisoned apple, eats it, and is killed. It is a question of fact for the jury, whether the child was sent on purpose. If he was, they should find the sender guilty of murder. On the other hand, if one gives a poisoned apple to A, with intent to murder A by his eating, and it should accidentally come to the hands of the child, and the donor should even interfere to prevent the child's eating it, yet the child being killed by eating the poisoned apple, the donor is guilty of murder ; for the law will infer an intention to kill the child, even against the fact. It is the same thing as to fraud. Where it depends on the actual intent, it is for the jury : if upon the constructive intent, the whole is a matter of legal inference for the Court.

We shall doubtless be told that this is the case of a mere mortgage, and that, therefore, *possession need not follow*. This position is not maintainable ; and the only case which looks that way is *Barrow v. Paxton*. (c) The acknowledged distinction between a mortgage of goods and a pledge, will be found in 1 *Powell on Mortgages*, 3, 4, and in the 2d chapter, p. 29, the subject is taken up, and almost the whole of that chapter is devoted to the inquiry, in what cases possession of the mortgagor and vendor is fraudulent as to creditors and purchasers ; and mortgages and absolute sales are placed by him on the same footing, in which he is abundantly sustained by the cases which he cites. He begins the chap-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(b) 1 Burr.
474.

(c) 8 Jek.
Rep. 258.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

ter by saying, that "A mortgage being a contract of sale executed, with power to redeem, must have all the properties and qualities incidental to the validity of an absolute disposition." He then proceeds directly to apply the statute of *Elizabeth* to fraudulent mortgages of chattels; and considers the mortgagor, who continues in full possession, as within its purview. We do not deny the doctrine, that when there is such a conditional sale, that possession in the vendor is consistent with it, the possession is no evidence of fraud; but a mortgage is not that case. There the property passes presently, defeasible by condition subsequent; but it is only where the condition is precedent, that the vendor's possession may be said to be consistent with the deed. The bill of sale should be such as to vest a future interest; as where it is to become absolute on the payment of a sum of money at another day. What the Court say in *Barrow v. Paxton*, is, that "delivery always accompanies a pledge, but a mortgage of goods is *often valid* without delivery." These words, *often valid*, are very cautious and qualified. They are no more than may be said of an absolute sale without change of possession, which, in common with a mortgage, may, under peculiar circumstances, *often be valid*. *Barrow v. Paxton* presented one of those circumstances. The bill of sale retained a right of distress. The goods continued on the demised premises, and the rights of creditors were not at all in question. The defendant was a purchaser, with full notice of the plaintiff's claim—a mere fraudulent volunteer, who had no right to protection. The remark of the Court, that a mortgage may be *often valid*, unaccompanied with delivery, is sustained by various other acknowledged exceptions to be found in the 2d chapter of *Powell*, before quoted. Why should there be any distinction between an absolute sale and a mortgage? Why is it that continuance of possession in the vendor is holden fraudulent? Because it gives him credit. Where is the difference in fact, whether the vendor has given a mortgage or bill of sale? How much better off is the creditor on account of the proviso in the bill of sale, than if he had been deprived of the property without a proviso? The principle contended for on the other

side, leads to all the evils of allowing an absolute sale, without a transfer of possession. All the parties need do, in order to give it complete effect, is to attach a proviso.

In *Clayborn v. Hill*,^(d) a mortgage of personal property, the possession continuing in the mortgagor, was declared valid, upon the sole ground that such mortgages were recognized by a statute of *Virginia*, which guarded against fraud, by providing that the mortgage should be recorded, like our mortgages of land. But, even in that case, the question did not necessarily arise; and the conveyance was pronounced void, on the ground that the equity of redemption had been released, and the possession of the vendor continued notwithstanding. This was the only point directly before the Court. The remarks in regard to the mortgage, as such,^(e) are mere *obiter dicta* of the President.

The case of *Clow & Sharp v. Woods*, decided by the Supreme Court of *Pennsylvania*, at *Pittsburgh*, Sept. 1819, MS.^(f) drew in question the validity of an unrecorded mortgage of goods, which continued in possession of the mortgagor. It was adjudged fraudulent as to creditors, from the mere circumstance of the continued possession; and, per *Gibson, J.* in delivering the opinion of the Court—"The statute, 13 *Eliz.* does not, in words, declare a conveyance of goods fraudulent, where the vendor retains possession; but, in general terms, renders void all conveyances made to the end, purpose and intent of defrauding creditors. Hence it becomes incumbent on the Courts to determine, from all circumstances of the case, whether the conveyance be or be not made with a fraudulent intention; and, in judging of that, it is held, that any neglect in leaving the vendor in possession, is fraudulent within the statute. The general rule is, *that the possession must be transferred to the purchaser.* But, it has been said, the rule does not apply to conditional sales: *that is altogether without foundation*; for neither this statute, nor 27 *Eliz.* which provides for the securing of purchasers, makes any difference between absolute and conditional sales. The only question is, whether the sale be fraud-

UTICA,
Aug. 1824.

Bissel
v.
Hopkins.

(d) 1 *Wash.*
Rep. 177.

(e) *id.* 184,
S. C.

(f) 17 *Ves.*
Jun. Phil. ed.
of 1822, 196, n.
(1).

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(g) 1 *Alt.*
165, 185.

(h) *A. D.*
1749.

(i) 1 *Alt.*
167, *S. C.*

(j) *id.* 170.

ulent; and, if it be, it is within the statute. *Delivery of the subject matter of the contract, is as requisite in the case of a mortgage of goods, as it is in the case of an absolute sale.*"

In *Ryall v. Rolle*,(g) this question was much considered, and the doctrine laid down is, in terms, the same as that in *Clow & Sharp v. Woods*. The questions of fraud are held to depend on the same circumstances, whether they arise under 13 *Eliz.* or the statute of bankrupts, 21 *Jac.* 1. The very question here under consideration underwent the direct examination of Lord *Hardwicke*, C., *Lec.* Ch. J. of the K. B., *Parker*, Ch. B. of the Exchequer, and *Burnet*, J. of the Common Pleas, and they all agreed, in terms, 1. That the possession continuing in the mortgagor was not consistent with the deed, and that it was fraudulent in relation to creditors, considered either under the statute of fraudulent conveyances, or of bankrupts; and the cases before that decision,(h) to this point, are all summed up, in the course of the discussion, by the different Judges. *Burnet*, J. says,(i) "The next question to be considered will be in relation to the condition of creditors, where the debtor continues in possession of the goods mortgaged. This was fraudulent at the common law, and the 13 *Eliz. cap.* 5, s. 1, 2, provides against it, that *it shall be void*. There is no distinction whether the sale be absolute or conditional." Again :(j) "the only thing contended for is, whether the mortgagee shall be considered as the *true owner*, or the mortgagor; and there is no doubt the conditional vendee is the *true owner*, or *proprietary*; and there is no reason to make a distinction between an absolute and conditional vendee, but by confounding the difference betwixt pawns and mortgages. There might some doubt arise, if this was the case of a pawn, as in the case, 3 *Bulstr.* 17, but it cannot be doubted in the case of a mortgage, for it is an immediate sale to the mortgagee; and though the mortgagor may buy it again, or redeem by favour of a Court of Equity, till then the vendee is the absolute proprietor. A pawn is complete by a delivery, but on a conditional or absolute sale, the sale is complete by the contract, and the party is entitled to a delivery of the goods, as soon as he has paid the price. (*Salk.* 113. *Dyer*, 20, 203.)"

Again: "as there is no authority to warrant a distinction between absolute and conditional sales, so there is a case that destroys it. (*Stevens v. Sole*, in *Chanc. Trin.* 1736, 1 *Ves.* 352.)"

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

This, as I before remarked, should be understood of a sale defeasible upon condition subsequent, not precedent, as in the case put by *Burnet, J.* of a sale of goods which remain because the money is not paid; but, he adds, (k) "If a conditional vendee pay the money, and does not insist upon a delivery of the goods, he confides in the credit of the vendor, and not in any real or particular security; and ought to come in under the commission, as much as any other person that places a confidence in the bankrupt, and not in any other security." It is only, therefore, in case of a precedent condition, that the vendor may hold possession; and this distinction was taken by *Lee, Ch. J.* (l) on referring to 2 *Bulstr.* 226: and, on recurring to what *Coke, J.* says, in *Stone v. Grubham*, (m) it will be seen that he makes the same distinction, in terms.

(k) *id.*

(l) *id.* 178.

(m) 2 *Bulstr.* 226.

The bill of sale in question, in *Manton v. Moore*, (n) was but a mortgage; and yet it is evident the Court consider it resting on the same footing as an absolute bill of sale; or why should they advert to the various particular circumstances of the case to find a warrant for the goods continuing with the mortgagor?

(n) 1 *T. R.* 63.

Worseley v. De Mattos (o) arose under the statute of 1 *Jac.* 1 c. 15. It was a mortgage of goods, and it was agreed that possession was material. *Ld. Mansfield* remarks upon, and distinguishes three cases cited to shew that a change of possession was not necessary, (p) and says the first was against, and the other two could not be considered as deciding the proposition; and proceeds, "If he mortgages and parts with the possession of goods, the world has notice; but to give priority from mortgaging goods, of which the trader is allowed to act and appear as the owner, would be enabling him to impose upon mankind, and draw them in by false appearances. No injustice is done to such mortgagee; because he really trusts only to the general credit of the trader. The conveyance is not a fraud against him, but against his other creditors." In *Wilson v. Day*, (q) which was also the case of a personal

(o) 1 *Burr.* 467.

(p) *id.* 482, &c.

(q) 2 *Burr.* 327.

UTICA
Aug. 1824.

Bissell
v.
Hopkins.

(r) *id.* 830.
(s) *id.* 831.

(1) 2 T. R.
649.

mortgage, he says the same thing, (r) and *per Foster, J.* (s) a trader, before bankruptcy, may pay a particular creditor; or he may mortgage his effects to a particular creditor, *with possession delivered*; and here it is a mortgage, it is true, with a resulting trust to *Lawson*; but there is no alteration of possession; no delivery, which is the badge of ownership. (*Twyne's case*, 3 Co. 81. a.) *Wilmot, J.* concurred, in the same terms. *Ladbroke v. Crickell* (1) was a question between an execution creditor who had levied upon a vessel, and a creditor by bottomry (in nature of a mortgage) on the same vessel; and because the latter had reduced the ship into his own possession before the levy, he recovered: but, *per Ld. Kenyon, C. J.* "If no possession had been taken under this instrument, it would have been fraudulent; and any other creditor might have taken her in execution: but here the title of the first purchaser was consummated by taking possession of the ship."

(f) *Cowp.* 232.

In *Mace v. Cadell*, (t) *Ld. Mansfield* takes up and considers what is the true distinction between questions arising under the 13 *Eliz.* & 21 *Jac.* The latter, he held, subjects goods to the commission of bankruptcy, though they were not *originally* the bankrupt's, but were merely leased to him, if he used and possessed them as owner; and he says if this latter statute "meant to comprehend nothing more than is contained in the preamble, it means nothing at all; because even *before* the statute, if a man had *conveyed* his own goods to a third person, and had kept the possession, such possession would have been void, as being fraudulent, according to the doctrine in *Twyne's case*, 3 *Rep.* 81." In all other points the doctrine is the same, whether upon the statute of *Eliz.* or *James*.

Thus the Court will perceive, by adverting to the cases, that they all concur in the general rule, whether the bill of sale be absolute or conditional, that possession must follow the sale. Cases where it may be retained are mere exceptions to the rule arising from special circumstances. Whether the sale be absolute or conditional, a continuing possession in the vendor may be explained, but not in one case any more than in the other. What reasons are available, then,

in case the sale is absolute? Property not capable of delivery is one; as a ship at sea. Where the vendor refuses to deliver, though the money be paid, holds the vendee at arm's length, and puts him to his action of trover, is another. It is true that it may become material to inquire into the conditions of the sale, to see whether the reasons for retaining possession be good. If the sale be absolute, necessity alone is an excuse. If left even from the most humane motives, fraud is a presumption *de juris et de jure*, which nothing can resist. By classifying the cases, it will be seen that there is no difference of principle, though there may be in the expressions used. By some cases, we are told that where one makes a bill of sale to secure a debt, and the bill is absolute on its face, and there is a continuance of possession in the vendor, it will be deemed fraudulent unless such conduct be fully accounted for. We say necessity alone will account for it, under this rule. The same rule and same explanation holds where the owner sells for cash advanced, or an antecedent debt, though otherwise of money lent to buy the goods with. Where it is necessary that the vendor should do something about the goods for the benefit of the vendee, the former may retain possession for this purpose; and circumstances may render it imperiously necessary that he should retain the goods for the purpose of selling them for the vendee's benefit. In such a case the sale was holden not to be fraudulent. (c) Another exception may perhaps be considered as established; and that is, where the goods are disposed of by a public judicial sale to one, other than the creditor, and are left with the debtor; there it may be necessary to shew actual fraud. (u) Accordingly, in *Guthrie v. Wood*, (v) *Ld. Ellenborough* said, "The doctrine of possession applies to cases of conveyance from the party himself. The statute of *Eliz.* does not apply to a case like this, where the property is sold not by the party, but under a distress for rent." Goods conveyed by a marriage settlement, by a husband to trustees, in trust for the wife, are also an exception, from the peculiar nature of the transaction and the relation of the parties. (w)

It cannot be pretended that the present case comes within any of the exceptions to the general rule. The doctrine

UTICA,
Aug. 1824.
Bissell
v.
Hopkins.

(c) For these distinctions see the cases cited by Kent, Ch. J. in *Sturtevant v. Ballard*, 9 John. 337.

(u) *Cole v. Davies*, 1 *Ld. Raymond*, 724, 725.

(v) 1 *Starke*, 367, 369.

(w) *Cadogan v. Kennet*, Cowp. 432.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

is universal that there must be a satisfactory explanation why the possession continues with the vendor. Here is none. The possession was not even confined to a reasonable time for the vendor to arrange his affairs as a constable. It was left for the debtor's own use, for a long and unreasonable time. No case can be found justifying this. The money was due from the moment of the sale, but no time specified for its payment. The doctrine of the other side will enable any man to defeat his creditors of their just debts, and yet enjoy his property during his whole life.

S. M. Hopkins, defendant, *in pro. per.* submitted to the Court the following propositions, points and references in writing :

1. It is admitted to be the general rule, that a sale of chattels, unaccompanied by possession, is, by presumption of law, *prima facie*, fraudulent.

2. But this rule is subject to exceptions in all cases where the vendor's possession is for a fair and lawful reason ; and where that possession accompanies and follows the deed or bill of sale. (*Cowp.* 432. 2 *Bulst.* 225. *Prec. in Ch.* 285. 1 *Ld. Ray.* 724. 2 *T. R.* 579, *per Buller, J.* 1 *Cranch.* 309. 9 *John.* 201, & 9 *John.* 337, in which most of the above are cited.)

3. And our decisions have fully recognized the doctrine, that sales, subject to a general presumption of legal fraud, may still be valid in special cases, to be approved by judgment of law, such as, where the intent is fair—not calculated to work a wrong," &c. &c. (9 *John.* 33, *per Kent, Ch. J.* "unless in special cases to be approved by the Court," 5 *John. per Spencer, J.*)

4. And on those grounds a *bona fide* mortgage of goods is universally allowed.

5. In this case, the first instrument was a plain mortgage, payable on demand. It has all the qualities of a mortgage ; 1, a debt acknowledged ; 2, a property conveyed to secure payment ; 3, a clause of redemption.

6. The 2d instrument was plainly a mortgage also—or rather a continuation of the first, occasioned by a 2d adjust-

ment of the accounts, made at the close of the year; and it is upon the effect of the 2d instrument that the question turns.

7. This transaction was perfectly fair, reasonable, public, and well known to the defendant below.

8. In such a case as this, it would be no objection that the property might be kept from the other creditors a long time or even forever, if that had been the intent; for the other creditors can never have any just claim upon it.

He added, the conveyance here is of definite property, which is made the subject of a definite appraisal; and the *bona fides* admitted. There is nothing to intend. Every thing necessary to sustain the transaction is found by a special verdict, upon which, it should be remembered, the question arises. That verdict finds the *bona fides*. It is enough that it does not find *mala fides*; and the only question for the Court to decide is, whether fraud arises from such a case by necessary legal intendment. The value of the property is short of the debt. The bill of sale provides that, on payment, the surplus shall be released. *Bissell* did not obtain judgment nor even prosecute for his debt till after the pledge; and the seizure and conversion upon his execution was before default of paying the debt upon the second mortgage.

Much has been said about *legal fraud* and *fraud in fact*; and I agree that the understanding to be derived from the books is not very clear, as to what these phrases mean, and the distinction between them. One sells goods which, from motives of humanity merely, the vendee still suffers to remain in the possession of the vendor: The rules of law say this is liable to the imputation of fraud. The reason, says the Attorney General, is, because it gives a false credit. On this I take issue. The reason is totally different. It is that the parties have power to hatch up a fictitious debt, give it the appearance of fairness, and make it a colorable lien on property. The law, therefore, comes with a general rule to supply the defect of human testimony, and reach the truth. It seizes upon *indicia* as a standard of proof, and

UTICA,
Aug. 1824.

Bissell
v.
Hopkins

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

by a presumption *de jure*, pronounces the continuance of possession fraudulent. Then, I say, though *prima facie* fraudulent, this presumption may, in all cases, be repelled. It is always subject to be rebutted by proof that the sale is not fraudulent.

Two positions are taken on the other side, not exactly consistent. It is first said that possession continuing in the vendor is always an indication of fraud ; and then again, that, in certain cases, it may be accounted for ; and that the goods, being the subject of a mortgage, is one way of giving such an account. The moment you admit it may be accounted for, the rule is gone as to there being a presumption *de juris et de jure* ; for it depends upon, and is a question of fact. If a question of fact, may not human affairs be so modified as to present facts beyond those which have ever before entered into any case ? Is necessity alone an answer ? Shall it be said that a *bona fide* possession, and nobody injured, is not equally an excuse ? One gives property with fair appraisement, to an amount less than the debt, and passes it by mortgages. Is not this one of the answers which may be given ? Suppose it mortgaged at 7 years or 70 years : the debtor has a right to mete it out to creditors as he chooses : and why not 70 years, if no one is injured ? But "we cannot levy upon it." No matter. You gave no credit on the faith of it ; and are not injured. Then we come back to the inquiry ; wherefore does the law object ? Why does it interpose presumption ? I answered because, for aught we know, there may be fraud, and it being so liable, we will presume, and deny the truth and reality of the business, and call it a fictitious sale until explained and answered. Here it is explained. The record says it is fair ; and the plaintiff in error is driven to the length of saying that, in the face of a record, the Court must find bad faith.

Although the line of distinction which I advance, may not be well drawn, yet it has been constantly recognized by the Courts. It is not necessary to extend our inquiries beyond the 13 *Eliz.* and the cases upon that statute. Nor will I say that where third persons are injured by giv-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(x) 2 T. R.
597.

(y) 7 Taunt.
149. 2 Marsh.
427, S. C.

(z) *Supra*.

(a) 9 John.
197, 201.

(b) *id.* 337
339.

(c) *id.* 339.

ing credit or purchasing on the faith of the possession, Courts will not presume fraud in order to protect them. I was going on to cite cases to establish the distinction I last advanced ; but I will first examine *Edwards v. Harben*.(x) *Butler, J.* speaks of non-delivery as a circumstance, *per se*, which makes the sale void in point of law ; and adds, " we are all of opinion, that *if there be nothing but the absolute conveyance without the possession*, in point of law it is fraudulent." It is upon such propositions as this, scattered through the books, that legal intendment is insisted on. In that case the vendor sold, but retained possession ; and I admit the legal intendment of fraud followed ; but what becomes of the presumption, if there be *something else* in the case besides *conveyance* and *possession* ? How does this differ from cases of presumption *de jure* upon facts found by special verdict, or admitted by a demurrer ? Not one case can be found in which *bona fides* was made out, where fraud was ever presumed ; and the whole course of the authorities go on this ground. The late case of *Benton v. Thornhill*,(y) I shall not largely insist on, because I agree that it was of a mixed character upon the question of possession, which was left to the jury, to say whether fraudulent or not ; but contending for delivery upon a mortgage, is in the face of *Barrow v. Paxton*,(z) decided by this Court, which is a leading case, and which has guided the profession in transactions of this kind ever since. In *Craig v. Ward*,(a) the Court say, " There must be a fraudulent or deceptive purpose in view, or implied, under the special circumstances of the case." In *Sturtevant v. Ballard*,(b) the Court again recognize fraud as matter of actual intent. There must, say they,(c) " be some sufficient motive, and of which the Court is to judge, for the non-delivery of the goods, or the law will still presume the sale to have been made with a view to " *delay, hinder or defraud creditors*." Again : " In such cases, it has been frequently said not to be absolutely fraudulent ; or not so in point of law, to permit the donor to continue in possession. The only inquiry would be as to matter of *fact*, whether the transaction was really and

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(d) 7 T. R.
68.

(e) 2 B. &
P. 59.

(f) 1 Burr.
484.

(g) 1 Atk.
167-3.

(h) 3 T. R.
620, 621, n.
(a)

(i) 2 T. R.
597.

(j) 1 Burr.
476, &c.

intrinsically fair and honest." And after a full review of the cases, the whole are summed up in these words: "We may, therefore, safely conclude, that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shewn to, and approved of by the Court, fraudulent and void as against creditors." In *Manton v. Moore*, (d) *Grose, J.* says, "I am of opinion that the question of fraud was for the consideration of the jury, and the duty of the jury, in this case, has devolved on the arbitrator, who has determined that there was no fraud." *Kidd v. Rawlinson*, (e) was a purchase of goods at Sheriff's sale, but not by the judgment creditor, and the goods were left with the debtor; and *Ld. Eldon* relied upon this to take it out of the general rule; yet he treated it as a question of fact, and left it to the jury to pronounce upon the intent. In *Worseley v. De Mattos*, (f) per *Ld. Mansfield*, "Nay, the not taking possession, being only evidence of fraud, may be explained." In *Ryall v. Rolle*, (g) per *Burnet, J.* "Courts of Equity and juries are to consider upon the whole evidence, whether the conveyance was made with a view to defraud or not." In *Heselinton v. Gill*, (h) per *Buller, J.* "It has been frequently determined, that possession alone is not evidence of fraud; the transaction must be shewn to be fraudulent from other circumstances." In *Edwards v. Harben*, (i) per *Buller, J.* "On the other hand, there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed." The 21 *Jac.* has a different scope and object from the 13 *Eliz.* and the cases of *Worseley v. De Mattos*, and *Ryall v. Rolle*, and other cases arising under that act, do not apply; yet it will be seen by these cases, that fraud may be disproved even under the 21 *Jac.* This is apparent from the authorities cited by *Ld. Mansfield*, in the latter case. (j) *Powell* has been cited. He, too, proceeds throughout upon the idea that no delivery may be made, and yet the transaction not fraudulent; and he sums up the law in this man-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(h) *Pow. on
Mort.* 43, 44, 1
*Am. from 4
Lond. ed.*

(i) *id.* 45,
46.

(m) 2 *Caines'*
Cas. Err. 202.

(n) *Proc.
Ch.* 285, *case*
227.

ner : (k) " Another ground upon which cases have been considered as not within the purview of the statute (of *Eliz.*) is, that, by the specific words of the contract, possession was not meant to follow immediately thereupon ; for the circumstance which stains the transaction with fraud, is the false appearance held out, when one thing is done, and an appearance permitted, which imports the contrary ; an absolute, unqualified transfer of the right to the vendee, but the possession and use retained by the vendor, with no other object but to defraud. But there can be no fraud where the appearances agree with the real state of things. And what was the intrinsic nature of the contract, as to the retaining or parting with the possession, may be made out from the deeds where the transaction is in writing, and where the transaction is *en pais*, by such parol evidence as can be adduced for the purpose of proving it." Then, after illustrating this proposition by the case of *Bucknal v. Royston*, (*Prec. Chan.* 285,) he adopts (l) the words of *Ld. Mansfield*, in *Cadogan v. Kennet*, (*Cowp.* 432.) " Therefore the statute did not militate against any transaction *bona fide*, and where there was no imagination of fraud ; and so was the common law. The question, therefore, in every case was, whether the act done was a *bona fide* transaction, or whether it was a trick and contrivance to defeat creditors." In *Cortelyou v. Lansing*, (m) per *Kent, J.* speaking of a pledge ; " It is, therefore, to be distinguished from a mortgage of goods, for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge ; but a mortgage of goods is, in certain cases, valid without delivery." *Bucknal v. Royston*, (n) is a leading case upon these questions as to the validity of a mortgage without delivery, as between the parties, and as to creditors, under the statute of *Eliz.*—*Brewer* there mortgaged a ship in port, with the cargo and the profits of the voyage, but retained possession, and sold the cargo and invested the proceeds in other goods in the course of the voyage. A judgment creditor claimed the goods upon the return of the ship ; but the claim was overruled.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(o) 1 *Ld.*
Raym. 724-5.

Was the delivery, in that case, impossible? Could not the adventure have been taken into the lender's own hands, and the money lent at simple interest, instead of respondentia? Certainly, no physical or moral impossibility intervened. What, then, becomes of the doctrine of necessity? It is admitted, that a condition precedent shall excuse, according to what *Coke, J.* says, in 2 *Bulstrode*, 226. But this is only one exception among many; and the same effect has, again and again, been given to a condition subsequent. In *Cole v. Davies*, (o) it was resolved that if goods of *A* are seized upon a *fiery facias*, and sold to *B*, *bona fide*, upon valuable consideration; though *B* permits *A* to have the goods in his possession, upon condition that *A* shall pay to *B* the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent; though it was agreed that actual fraud might be shewn. If a mortgage require delivery, wherein does it differ from a pledge? Yet a distinction is constantly kept up.

(p) 2 *T. R.*
587.

(q) 1 *Burr*
482-3.

Talcott, in reply. It is true, that the books often say possession continuing in the vendor, is only, *prima facie*, evidence of fraud, and may be explained. This proposition I admit; but I deny its application to the present case. It should be taken in the same sense in which it was advanced by *Buller, J.* in *Edwards v. Harben*; (p) but the ulterior inquiry must be, is the explanation such as satisfies the law? This depends on the nature of the agreement between the parties, and the circumstances attending the sale. I do not contend for a physical or moral necessity as the only explanation which can be given. There are, I admit, other cases, among which *Bucknall v. Royston*, is the strongest. Lord *Mansfield* says, (q) that was a case "upon the course of administration of assets, where secret liens give priority. Besides, the possession there was a trust under an authority to negotiate and sell; and could not be meant to give any false credit." As to the distinction between a mortgage and pledge, in the latter there must be a delivery as between the pawnor and pawnee; the former may be good as be-

tween mortgagor and mortgagee without delivery, but not as to creditors ; and so is the passage from *Cortelyou v. Lansing*, as read by the gentleman ; “ a mortgage of goods is, in certain cases, valid without delivery.” Such language recognizes the doctrine that, as a general rule, delivery is necessary in the case of a mortgage. *Barrow v. Paxton*, I have shewn, maintains the same doctrine. “ Often valid,” as used in that case, is certainly not “ always.” In *Bucknal v. Royston*, it was part of the trust that the goods should remain. Why give this reason, if possession is always consistent with the mortgage ? Would it not have been enough to say, “ here is a mortgage,” and stop there ?

It is said the jury have found no fraud. This is a mistake: They have, in the language of the cases, found certain facts and intents, and referred the question of law arising upon these to the Court, and it is a proper question for the Court to determine. “ Fraud is a question of law, and especially when there is no dispute about the facts. It is the judgment of the law on facts and intents, as has been frequently observed by Judges of the greatest eminence.” (r) The jury find that a year and an half before the sale, a large variety of personal property, including the horse, was conveyed by a bill of sale to secure a debt, the whole continuing in possession of the debtor during all the time, from the date of the bill of sale, to the time when the horse was taken in execution at the suit of the defendant below. These circumstances, standing alone, render the sale void as to creditors, within all the English cases. It lies with the vendee to explain them ; and the Court are to say whether the explanation be sufficient, as to sales conveying a present interest. Something more than mere convenience is necessary. *Benton v. Thornhill*, (s) cited for the defendant in error, is against him. That was a bill of sale for securing a debt, and yet it was left to the jury to say whether the vendee's possession was honest. The jury were not called upon to say whether the vendor's possession was evidence of fraud, but whether the vendee's possession being color-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

(r) 9 John,
342, per Kent
C. J.

(s) 7 Taunt
149.

UTICA,
Aug, 1824.

Bissell
v.
Hopkins.

(1) Ld.
Raym. 286.

ble, was not, in truth, the vendor's possession ; and if the latter, it was agreed that the sale must be adjudged fraudulent. The jury found possession in the vendee. The case was put upon the question of possession alone ; and the jury were correctly told, that though the debt was honest yet the sale was fraudulent unless possession passed ; this, too, in the case of a mere mortgage or bill of sale, to secure a debt. So the jury, here, have not, as supposed, found against any fraudulent intent. They find possession continued, and for what purpose, expressly ; but it is for the Court to pronounce the conclusion of law, as was held in *Benton v. Thornhill*. *Maggot v. Mills*,⁽¹⁾ is relied on. In answer to this, I will barely refer to 1 *Atk.* 176, where it is said, " If the sale there had been to any other person than the landlord, it would have been fraudulent." Thus that case is considered as proceeding on a very narrow doctrine, which was equally applicable to *Barrow v. Paxton*. Indeed, in the latter case, the language of the Court rather seems to put it upon the doctrine of landlord and tenant.

Curia, per SAVAGE, Ch. J. The facts in this case are shortly these : In *September*, 1817, one *Jesse Dryer* rented of *Hopkins* a tavern stand and small farm, at an annual rent of \$120 ; which, however, was subsequently reduced. A book account had commenced between them in *April* preceding. Settlements were made at different times. At one of them, on the 1st *October*, 1819, *Dryer* was found in arrear \$274,84 $\frac{1}{2}$; and to provide for the payment and security of this sum, he executed a bill of sale of a variety of articles of personal property, including the mare now in controversy. It was agreed that the articles should be appraised by *Jerome Curtiss* ; and, upon payment being made, in the articles or otherwise, the surplus and remaining articles, if any, should be released. On the next day, the articles were appraised by *Curtiss*, at \$237,75, and the appraisement endorsed on the bill of sale.

On the 1st *January*, 1821, another settlement took place, at which a balance of \$146,61, was found due from *Dryer*,

and another agreement was written on the same paper with the first, as follows : " 1821, *January 1*. Settled the amount of the above to this time, and adjusted the balance at \$146, $\frac{9}{16}$, for which so much of the above property as remains on hand is to remain liable. The mare above mentioned is to be delivered to *Malcom M Naughton*, on demand, but she is intended to remain in said *Dryer's* use for the present, and he is to pay into *Elihu Scofield's* hands, for said *Hopkins* in good judgments or securities, or to said *M Naughton's* hands, in grain, the amount of \$50, within one month, and on continuing his payments in proportion, the mare is intended to remain with him." *Dryer* continued indebted to *Hopkins*, and at the time of the trial in the Court below, (*May*, 1821) was still indebted more than \$100. A large portion of his debt was for rent. More than one year's rent was due at the time of the sale.

UTICA,
Aug. 1824.
Bissell
v.
Hopkins.

In the month of *November*, 1817, an account commenced between *Dryer* and *Bissell*, and in *March*, 1820, a considerable balance being due, a suit was commenced against *Dryer*, and a judgment recovered in *September*, for \$91,58. Execution was issued on the *4th January*, 1821, and delivered to the Sheriff, who was directed by *Bissell* to levy on the mare, while she was off the premises rented by *Dryer* of *Hopkins*. This was done, while the mare was in *Dryer's* possession, and in *February* she was sold at auction. *Bissell* became the purchaser. No rent was tendered or offered to be paid ; and *Bissell* had notice of *Hopkins's* claim on the mare, before the sale.

The object of leaving the mare with *Dryer*, was to enable him to settle and close his business as constable, he having no other horse. Applications were made to him for the purchase of the mare, to which he always answered, she was not his, and that *Hopkins* had a claim on her, or owned her. *Hopkins's* claim was publickly known. There was no secrecy about the transaction. When the bill of sale was executed, *Dryer* was indebted to both plaintiff and defendant, and to others, but no judgment or execution, of consequence, was obtained against him, till after the assignment. The mare remained in *Dryer's* possession from the date of

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

the first instrument, till seized by the Sheriff. Part of the articles had been delivered, and credited on account.

The bill of sale of the 1st October, 1819, was clearly a mortgage payable on demand, and I can see no grounds for the imputation of fraud *in fact*; nor do I conceive the facts such as to constitute *legal* fraud. It is very distinguishable from *Twyne's case*, (3 Rep. 80.) The property was received at a fair valuation. The donor continued in possession; but no person was deceived or defrauded. There was no secrecy—no concealment—no suit pending till several months afterwards.

I do not think it necessary to enter upon a minute review of the cases. Kent, Ch. J. has examined many of them, in *Sturtevant v. Ballard*, (9 John. 338) and comes to the conclusion, that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shewn to and approved of by the Court, fraudulent and void as against creditors. The learned Judge, no doubt, intended to say here, as in *Barrow v. Paxton*, (5 John. Rep. 261) that possession continuing in the vendor is only, *prima facie*, evidence of fraud, and may be explained. The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. (*Cadogan v. Kennet*, Cowp. 435.) The possession, by the vendor, of personal chattels after the sale, is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase, against creditors. These points were directly resolved in *Brooks v. Powers*, (15 Mass. Rep. 244.) It appeared, in that case, that one *Witt*, in the years 1816 and 17, lived on a farm of the plaintiff, under distinct leases for each year, dated the 1st April. On the 14th April, 1817, a few days before the defendant's attachment issued, *Witt* gave the plaintiff a bill of sale of the oxen in controversy, and delivered them on the farm in payment of the rent of part of the prece-

UTICA,
Aug. 1824.
Bissell
v.
Hopkins.

ding year and the whole of the ensuing year. The plaintiff then agreed that *Witt* should have the oxen to carry on the farm, and they remained in his possession when the defendant caused them to be seized under his attachment. The Court held the sale valid, and expressed themselves generally as to the effect of the vendor's continuing in possession in the manner I have already stated. *Benton v. Thornhill*, (7 Taunt. 149) is a case somewhat similar.

The reason why the continuance of the vendor in possession will be accounted fraudulent is, that it gives him a false credit, by which third persons are deceived. That reason fails in this instance. When the bill of sale was executed, *Dryer* was known to be indebted to several persons, but whether he was reputed to be insolvent does not appear. His landlord had an undoubted right to secure himself for his rent. *Dryer* had a right to prefer one creditor, provided it were fairly and honestly done. In this case, the *bona fides* of the transaction is not questioned. A good reason is given, in my judgment, why the tenant was not at once stripped of his property, as thereby his power of acquiring the means to pay his debts, would have been taken from him. No deception was practised. The transaction was publick. *Dryer* himself, always, after the mortgage, stated the property of the mare to be in *Hopkins*. *Bissell* knew it before the sale, and probably before he prosecuted *Dryer*.

In my opinion, the Common Pleas decided correctly, and their judgment should be affirmed.

Judgment affirmed.(1)

(1) Perhaps nothing farther, upon the much litigated question, how far possession by the vendor, after a sale of goods, shall be evidence of fraud as to creditors, ever can be reached by way of legal rule, than what is advanced by the Court in this case, to wit, that such possession is, *prima facie*, evidence of fraud, but may be explained. (Vid. *Dickenson v. Cook*, 17 John. 332.) It seems to be a mere rule of evidence calculated to shift the *onus probandi* from the creditor to the vendee. The details or circumstances which shall constitute fraud, like those of usury, or the degree of neglect which shall render a man liable in an action on the case, seem to mock the efforts of a general rule, and must be ranged forever without the

UTICA,
Aug. 1824.

Bisell
v.
Hopkins.

line which divides the province of the Court from that of the jury. The law may declare that fraud shall vitiate the sale; but as the devices by which that fraud is to be compassed and disguised, may be various, so the evidence by which it is to be established or repelled, must frequently vary with the cases as they arise

Some judges have started, with a high-toned rule, that unless a change of possession follows immediately, it is not only evidence of fraud, but, *per se*, makes the sale fraudulent and void. (*Edwards v. Harben*, 2 T. R. 596-7, *per Buller, J. Hamilton v. Russell*, 1 Cranch, 317, 318, *per Marshall, Ch. J. Davies v. Cope*, 4 Binn. 265, *per Tilghman, Ch. J.*) But these learned Judges were embarrassed with numerous exceptions in the out-set; and when the late Ch. J. Kent made an effort, in *Sturtevant v. Ballard*, (9 John. Rep. 337) to introduce the same rule, as far as possible, into the jurisprudence of this state, he found it encumbered with the following exceptions, which he enumerates: 1. Where a creditor is knowing and assenting to the sale, (*Steel v. Brown*, 1 Tauxat. 381). 2. Where the sale is conditional, (*per Coke, J. in Stone v. Grubham*, 2 Bulstr. 225; and *per Buller, J. in Edwards v. Harben*, 2 T. R. 596, *i. e.* in the last case, a condition precedent to be performed by the vendee. 3. Where the goods remain with the vendor, to be sold for the benefit of the vendee, the vendor being a borrower on bottomry, (*i. e.* a mortgagor) the trust being declared by the deed, (*Bucknal v. Royston, Prec. in Ch* 285). 4. Where A purchases the goods on a *fi. fa.* in favour of B, and leaves them with the judgment debtor, to the intent that he pay for and redeem them, (*Cole v. Davies*, 1 Ld. Raym. 724). 5. Where the goods purchased in this manner are left, from benevolence, or for a temporary and honest purpose, (*Kidd v. Rawlinson*, 2 B. & P. 59). 6. Where money is lent to buy furniture, and a bill of sale honestly taken to secure the re-payment of the money. 7. Where the purchase was a fair one, at publick sale, and the goods are left with a relation or friend, (*per Shippen, Ch. J. in Waters v. M'Lellan*, 4 Dall. 208). 8. Where the vendor is an intended husband, and sells to trustees to make a marriage settlement upon his future wife, (*Haselinton v. Gill*, 3 T. R. 620, *in notis*; *Cadogan v. Kennel, Coups* 432). And he concludes that, except in special cases, and for special reasons, to be shown to, and approved of by the Court, continuance of possession is fraudulent.

To these may be added, from our own reports, 9. *Barrow v. Paxton*, (5 John. Rep. 258) where stress was laid almost exclusively on the circumstance that the bill of sale was a mortgage; (*U. States v. Howe*, 3 Cranch, 38, 39, *per Marshall, Ch. J. S. P.*) 10. Where the non-delivery arises from the sickness of the vendor's depository, (*Beals v. Guernsey*, 8 John. 451). To these exceptions may be added, 11. Where the assignment is of a cargo in a ship lying at the port where the assignment is executed, but bound to a foreign port, the assignment providing that remittances shall be made to liquidate the debt due to the vendee, in consideration of which debt the assignment is made, &c. (*Davies v. Cope*, 4 Binn. 258). 12. Where the conveyance was late on Saturday night, and the possession remained unchanged till Monday, (*Will v. Franklin*, 1 Binn. 517). 13. The Supreme Court, in *M'Intyre v. Turner*, (9 John. 135) seem to question the right of the creditor in

an execution, to purchase goods under his execution, and leave them with his debtor, but in *Eng.* and even this distinction is done away by the case of *Watkins v. Birch*, (4 Taunt. 822). " This was trespass against the Sheriff of *Middlesex*, who had taken certain goods in execution, at the suit of *Brusfield* against *Duncan*. *Duncan* had executed a warrant of attorney to confess judgment to the plaintiff, and, after judgment entered up, she issued a *fi fa.* and caused the effects of *Duncan* to be sold at public auction, and herself became the buyer, whereupon the Sheriff, in *February*, 1811, in consideration of £58, which the plaintiff actually paid, executed a bill of sale of the goods to the plaintiff. In *May*, 1811, she agreed to let the goods to *Duncan*, who still retained the possession, for a rent; which was regularly paid, and receipts given. When *Brusfield's* execution was about to be levied, *Duncan* clandestinely removed certain other goods which were in his possession, but none of those which the plaintiff had so bought. Upon the trial of the cause, *Pell*, Serjt. for the defendant, endeavoured to establish, upon the cross-examination, a case of actual fraud on the part of the plaintiff, but the facts completely rebutting it, a verdict passed for the plaintiff. Upon moving for a new trial,

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

Per MANSFIELD, Ch. J. Unless it can be made out that the fact of a former owner of goods being in any way afterwards permitted to possess them, is a badge of fraud, I know not how this verdict can be set aside. The plaintiff buys these goods and lets them, and receives rent for them; and can we say that a person who, under an execution, has bought goods, may not let them to the former owner of them? No case has gone so far as that. It is a much stronger case, on account of the letting of the goods, than if she had permitted them to remain in the custody of *Duncan* without any consideration.

GIBBS, J. It is impossible to distinguish this case from the case of *Kidd v. Ruckinson*, (2 B. & P. 59.) The circumstance of the plaintiff being a creditor makes no difference, if the creditor takes a regular bill of sale from the Sheriff.

Motion for a new trial denied."

In *Reed v. Blades*, (5 Taunt. 216) S. P. per Gibbs, J.

14. So in *Guthrie v. Wood*, (1 Starkie's N. P. Rep. 387,) the plaintiff purchased the goods under a landlord's warrant of distress, and left them in possession of the tenant, the original owner, where they were seized upon an execution, at the suit of the tenant's creditor; and, per Ld. *Ellenborough*, " I had supposed that evidence would have been given of some collusion on the part of the landlord, with the plaintiff; but nothing of this kind appears. The doctrine of possession applies to the cases of a conveyance from the party himself. The statute of *Elisabeth* does not apply to a case like this, where the property is sold, not by the party, but under a distress for rent. *Guthrie* became the purchaser at the sale, as any other person might have been, and it was at his option to take the goods or leave them. He was the legal proprietor, and the creditor had no right to take them in execution." Verdict for the plaintiff.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

15. A ship abroad may, of course, be sold, and possession retained by the vendor till her return. (*Putnam v. Dutch*, 8 *Mass. Rep.* 287.)

16. A *bona fide* sale of bricks in a brick-yard, accompanied with a lease of the yard to the vendee, until the bricks should be sold and removed, was held valid against the creditors of the vendor, without actual removal. (*Allen v. Smith*, 10 *Mass. Rep.* 308).

17. In *Benton v. Thornhill*, 7 *Taunt* 149) the following facts appeared at *Nisi Prius*. *Sparrow*, a farmer, had borrowed £600 of the plaintiff, who was his brother-in-law, and the plaintiff had sent his son to *Sparrow*, to obtain from him a bill of sale of all his effects, as security. *Sparrow* executed a bill of sale, accordingly, of *all his effects*, but not including the lease of his farm. The plaintiff's son took possession of the stock, and continued to reside in *Sparrow's* house, and employed labourers, &c. *Sparrow*, however, continued to reside in the house, and still appeared to act as master, the servants on the farm not knowing that the plaintiff's son had taken possession, as he gave them orders in *Sparrow's* name, who sold a cow and some crops, and exercised other strong acts of ownership. The goods having been afterwards taken in execution by the Sheriff, at the suit of a creditor of *Sparrow*, on a judgment for £600, (a debt due when the bill of sale was executed) an action was brought for them by the vendee, against the Sheriff. All these circumstances having been left to the jury, by Ld. Ch. J. *Gibbs*, who tried the cause, they found a verdict for the plaintiff, thereby establishing the validity of the bill of sale; and the Court of Common Pleas refused to grant a new trial.

Shepherd, Solicitor-General, on moving for a new trial, cited *Twyne's* case, (8 Co. 80, b.) and *Edwards v. Harben*, (2 T. R. 587) and distinguished this case from those of *Kidd v. Rawlinson*, (2 B. & P. 59) and *Dawson v. Woods*, (3 *Taunt.* 256). But he mainly relied on *Wordall v. Smith*, (1 *Campb.* 332) and what Ld. *Ellenborough*, Ch. J. says there. Strangers could not know that *Benton*, the son, was not residing with his uncle as a visitor. The bargainee ought to have an absolute, notorious, and exclusive possession: if the vendor remains on the premises, and continues to manage the property, the vendee having merely the instrument in his pocket, the sale is nugatory and fraudulent. But,

Per *GIBBS*, Ch. J. "I certainly meant, at the trial, to give the defendant the benefit of all the arguments now used in his behalf. I believe that in summing up the evidence, I did give him the benefit of all those arguments. I left it to the jury, whether this possession of *Benton's* were an honest one; for that, if a bill of sale to *Benton* were attended with a possession, there being a debt honestly due to *Benton*, *Sparrow* had a right to make this conveyance to *Benton*, for securing his debt, and then the execution came too late, there being no bankruptcy here. I stated that the question, whether the transaction were fraudulent, depended on the object of the bill of sale, and on the circumstance, whether, under that bill of sale, an actual *bona fide* possession was delivered to young *Benton*, acting on the behalf of his father. I stated the positive oath of young *Benton*, that he was sent by his father for the bill of sale, and that he did get it, and that he remained

in possession under it. I also left to the jury all the circumstances which went to falsify *Benton's* evidence. *Sparrow's* acts of continuing ownership—his sowing of the corn—his declarations when the officer entered—and his remaining on the farm—which last circumstance, indeed, deserved no great weight; for his term in the land was not conveyed. And I told them, also, this, that even if there was a *bona fide* debt due from *Sparrow* to the plaintiff, yet if they thought that, beyond that debt, the conveyance was meant to colour and protect the residue of the property from *Sparrow's* other creditors, it was void for the excess. I also pointed out that the value of the property, particularly at that time, was a fluctuating one, and that, if it was the intention of the parties merely to provide for the debt to *Benton*, the verdict must be found for the defendant. The jury have come to a conclusion on these facts; and if I were to sum up the evidence to them again, I could not sum it up otherwise than I have done."

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

DALLAS, J. "This is moved upon the ground that the verdict was given against the weight of evidence; but *I think the verdict is even consistent with all the evidence.*"

PARK, J. concurred.

BURROUGH, J. "My Lord seems to have put the case to the jury on all the grounds on which it can be put, and there is no foundation for granting a new trial."

In the course of his charge to the jury, *Gibbs*, Ch. J. glanced at another circumstance, which, I suppose, must often present itself in trying a mortgage of personal property, viz. "*If beyond Benton's debt, the conveyance was meant to colour and protect the residue of the property from Sparrow's other creditors, it was void for the excess.*" Would not the mortgage be void for the whole, upon such a circumstance? In *Wilson & Wormal's* case, (*Godbolt*, 161) *Coke*, Ch. J. and *Foster*, J. were at issue upon a point like this. *Coke* said, "If a man who has goods of the value of £30, only, be indebted to two men—to one in £20, and another in £10; and the debtor assign to the one to whom he is indebted £10 all the goods which are worth £30, to the intent, that for the residue above the £10 debt he shall be favourable to him, this assignment is altogether void, because it is fraudulent in part." But, per *Foster*, J. "It shall not be void for the whole; but only for the surplusage." "If the creditor were aware of the fraudulent intent of the debtor, (says *Long*, in his *Treatise on Sales*, 78) it seems most consonant to the general maxims of the common law, that fraud vitiates every thing, as well as to the provisions of the statute of *Elizabeth*. that the transaction should be completely avoided: if, on the other hand, the creditor were not aware of other debts being due from the debtor, but considered himself as honestly standing in the situation of trustee for the debtor, as to the excess above what would be sufficient to pay his own debt, it seems most reasonable that the assignment should be held good to the amount of the debt due, and that it should be avoided for the remainder." There is a difficulty in making this idea, that the sale shall be good in part

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

and bad in part, square with the remedy. It is easy to conceive, that the severance may be made in Chancery, as was done in *Boyd & Sugdam v. Dunlap et. al.* (1 John. Ch. Rep. 478). So it might be done in trespass or trover, at the suit of the vendee, without doing absolute violence to the form of the remedy; but should replevin be brought, which is for a recovery of the specifick article or articles in question, or ejectment for land fraudulently sold or mortgaged, it is not easy to conceive how the distinction could be preserved. But this by the by.

18. The case of *Devey v. Baynton*, (6 East, 257) presents another exception, viz. that a wife may, after marriage, buy her husband's personal property in exchange for her separate estate, and leave it in his possession as before; and yet this shall not be deemed fraudulent as to creditors, provided it be proved fair in all other respects. The case was shortly this: Lord Arundell, who had a life interest in a settled estate of Lady Arundell, (both being aged) of at least 3000*l.* a year, whereof the ultimate reversion, on failure of issue male, (of which there was none) was in Lady A.; and Lord A. having furniture and pictures in his mansion of not less than 8000*l.* value, being pressed by his creditors, in pursuance of an agreement with his wife, Lady A., conveyed all his property to trustees, (who had married his two daughters) for the benefit of his wife and daughters, and subject to his wife's future appointment; in consideration whereof, the wife discharged him of above 3000*l.* before he died on the estate, principally for his use, and enabled the trustees to raise out of the estate 12,000*l.* more, for the benefit of Lord A.'s creditors, but subject to the appointment of him, his executors, &c.; and also covenanted to levy a fine, which was levied a year afterwards; and he covenanted to deliver an inventory of the goods to the trustees, within 6 months, which was not done. And after the conveyance he continued to use the furniture in the house as before; and was soon afterwards sued by several of the creditors, whose executions against his goods were satisfied by him, without setting up the trust deed, or resorting to the trust fund; but money was raised on it afterwards, for other creditors; and above two years after the deed, the husband being sued by the plaintiff, a creditor before the date of the trust deed, this was set up in bar of the levy upon the goods in the house; and the Sheriff returned *nulla bona*. And upon an action brought for a false return, held, that in the consideration of the question whether this were a *bona fide* transaction, or a contrivance to defeat creditors, and therefore void at common law, or by the 13 *Eliz. ch. 5*, it was material to submit to the jury the relative value of the property, withdrawn from the reach of the creditors in proportion to the amount of their demands at the time, and the value and tangibility of that substituted in its place, in aid of the conclusion that the deed was covinous against them; and, therefore, a verdict for the plaintiff, founded principally on these concomitant circumstances: 1. The previous embarrassment of the husband—2. The want of notoriety of the conveyance at the time—3. The want of an inventory—4. The continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property—and, 5. The appropriation, by the husband, of a part of the money raised by the trustees, to his own use, without objec-

tion—was set aside, and a new trial granted, to bring the question more fully before the Court and jury as to the *good faith* of the transaction, and the *value of the consideration*, and its availability to the creditors.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

Ld. ELLENBOROUGH, upon the first trial of this cause, at *Nisi Prius*, made a distinction between this case and that of *Cadogan v. Kennet*, (Comp. 432; and he also questioned the case of *Kidd v. Rawlinson*, (2 B. & P. 59) as it appears by 10 *Ves. Jun.* 145, where the same matter came up in the Court of Chancery. The verdict being for the plaintiff, the Lord Chancellor, *Eldon*, was moved for an injunction against other executions levied upon the same property, on the ground that the verdict was contrary to law and fact, and that a new trial would be moved for in the K. B. This was the case of *Lady Arundell v. Phipps & Taunton*, (10 *Ves.* 139, 151) in which Ld. *Eldon*, (10 *Ves.* 145) was fretted to think that Ld. *Ellenborough* should have made so bad a use of the maxim that *possession proves fraud*. Indeed, his whole opinion is remarkably strong and clear, as to the force which should be allowed to that rule.

The Lord Chancellor. "Upon this case I believe that my decision in the Court of Common Pleas, (*Kidd v. Rawlinson*, 2 B. & P. 59) was disputed. My opinion upon the trial of that cause was, that possession is only, *prima facie*, evidence of fraud; and as that property could not be reached by bankruptcy, and the possession was according to the deed which created the title, and the title was publicly created, that was not fraudulent possession against the creditors in general; and, upon a motion for a new trial, the Court agreed with me. With great deference, if Ld. *Ellenborough* thinks otherwise, I am, at present, of the same opinion; and I am also, at present, of opinion, upon the doctrine of this Court, that if the purchase of the wife is *bona fide*, it is of no consequence whether it was before or after marriage. The mere circumstance of possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is, *prima facie*, evidence of property in the man possessing, until a title, not fraudulent, is shewn, under which that possession has followed. Every case, from *Tryne's* case, (3 *Rep.* 80) downwards, supports that, and there was no occasion otherwise for the statute of *King James*, (21 *Jac.* 1, *ch.* 19, *s.* 10, 11.) Can there be any doubt that a married woman, having separate property, may buy an interest in the property of her husband, by a settlement under the direction of this Court?"

The injunction was granted upon an undertaking not to remove the goods.

A motion was afterwards made in *Dewy v. Baynton*, for a new trial, which was granted; the cause tried a second time, when a verdict was again obtained for the plaintiff, upon which a motion was again made for a new trial upon the circumstances as above detailed from the report of the case in 6 *East*, 257; but, in the mean time, the question was again up before the Ld. Chancellor in *Lady Arundell v. Phipps*, (10 *Ves.* 146, 7, &c.) and his opinion shews the great variety of considerations which may enter into a question of fraud.

UTICA,
Aug. 1824.

Bissell

v.

Hopkins.

The *Lord Chancellor*. "I granted this injunction, on the ground that this bill was brought; stating that *Lady Arundell* was, according to law, to be considered equitable owner of goods and chattels of a very special and peculiar kind; that she became so under a contract of purchase; which she insisted she was entitled, in a mode, to make with her husband himself; that she had contracted with him for the ownership, and instruments were executed, placing the legal property in trustees for her use and benefit; and attending to all the circumstances, her title, as administered in this Court, and the title of her trustees, as administered in other Courts, are as incapable of being impeached, as they were upon the date of the instrument; that an action was brought by a creditor, and the Sheriff was prevailed on to return *nulla bona*. An action was brought against him for a false return by the creditor; insisting, he might have had possession of these goods and chattels, either the property of *Lord Arundell*, or in a question between him and his creditors and all other persons, including *Lady Arundell* and her trustees, liable to her husband's creditors. The form of the action being against the Sheriff, it depended upon some arrangement in a Court of law, whether the trustees of the wife could maintain the question, that these were not the goods of *Lord Arundell*, or liable to execution by his creditors: what arrangement I do not know: but I do not think myself at liberty to surrender the jurisdiction of this Court; because the Court of King's Bench may by some arrangement execute the jurisdiction of a Court of Equity. It is my duty to give the plaintiff relief according to the rules and proceedings in this Court, if she is entitled to sue here; and *Lady Arundell*, from the nature of her title, had a right to have it decided here by some mode of proceeding.

"From the only account I have had of this case [*East's* report of the case was not then published] in the Court of King's Bench, it appears to have been asserted, that a husband and wife could not, after marriage, contract for a *bona fide* and valuable consideration, for a transfer of property from the husband to the wife or trustees for her. The doctrine is not so either here or at law. I stated before what I conceived the doctrine of this Court and of the law upon this subject. There have been two trials, as there was a mistake in point of law upon the first. As to the subsequent trial, I know nothing except what is said here. But if the case is finally to be decided here, there are many points deserving great consideration, and very fit for discussion, as connected with every fact and circumstance of the case in detail; as bearing upon the question whether this instrument is fraudulent against creditors. When *Lord Mansfield* upon this subject speaks of trick and contrivance (in *Cudogan v. Kennet*, 1 Cowp. 435) he ought to state what the law denominates trick and contrivance. For instance, in this case, if the purpose of this instrument was to defeat creditors, it is said to be bad, I desire that may be reconsidered. If the express object of this purchase was to vest this property, of the value of 12,000*l.* in trustees to transmit to the daughters of *Lady Arundell*, if she paid the value, 12,000*l.* to the creditors of *Lord Arundell*, that is not illegal. It is assuming a great deal to say it is delaying or defeating creditors. But, if so, it has in all time been sanctioned by this Court and Courts of law too. If the property transferred was of the immediate value, at which this has been stated,

certainly then it ought to be submitted to the jury whether it was not fraudulent as to a great part. It is said the limitation to the daughters here is not to be deemed a part of the consideration of the settlement with reference to the creditors. It is not necessary to touch upon that, if the property bore any reasonable proportion to the value of 12,000*l*. If it were necessary to discuss it, attention must be given to the cases of moral obligation, executed by a provision for persons, not the direct objects of the contract, in which that provision has been held such a part of the consideration as would support their interest, as well as those with regard to whom that contract was more directly entered into.

Then as to possession, and the other circumstances relied on at law : suppose the question arose the day after the deed was executed, and the 12,000*l*. had become, under the circumstances, to all intents and purposes a part of the assets of Lord *Arundell*; which I see, was questioned at the bar: suppose it proved the day after, that the property was worth that sum : could it have been contended, for the want of publicity, of an inventory, of possession, considering the nature of the subject, and the relation in which the parties stood, this would not have been a deed, the trusts of which must have been executed for Lady *Arundell*. If it is contended that the deed was originally fraudulent, because no consideration was paid or what a Court of law would call colorable, all subsequent facts and enjoyment tell forcibly, connected with the objections to the deed, at the time of execution. They are evidence in the other case ; but such as, when the value is appreciated, ought to be stated to the jury, to be weighed, regard being had to the law, if the question had occurred immediately after the execution. The circumstances of not informing witnesses, the steward, &c. would not have weighed with me ; as they are circumstances in almost every transaction of this nature ; and, therefore, not so unusual as to afford a fair ground of suspicion. Then as to the nature of the possession, what is the publicity to be ? Suppose there were no trustees ; but an agreement without the interposition of trustees, by a covenant that this property, upon the wife's advancing 12,000*l*. to the creditors of the husband should be to her separate use. The nature of the transaction must have left the legal property in the husband ; and I doubt extremely whether that could be a fraudulent possession even in a Court of law. Clearly it would not here. Suppose this had been before marriage, and these articles had been settled as heir looms ; and it is exactly the same, if after marriage and for valuable consideration ; what is the publicity shewing they are heir looms ? What is the nature of the property, and the sort of possession naturally to be looked for ? When Lady *Arundell* was making a settlement for the benefit of her daughters, afterwards in all probability to enjoy the possession of this ancient family seat, there was neither legal nor moral fraud in taking the property, for which she paid the value. But the nature of the property, the relation of the parties, the circumstances, that she should have no object but to transmit it to her family, and that she must live with him who sold it, those circumstances are very material as to the possession.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

UTICA,
Aug 1834.

Bissell
v.
Hopkins.

"It is said Lord *Arundell* dealt with creditors, as if this was his property; and there might be a considerable question, whether his or the steward's dealings in conversation or correspondence with creditors, as if this was part of the husband's property, is to be admitted in a question between husband and wife; more difficult perhaps between the creditors and the Sheriff; but it is extremely possible, that such a case might be laid in evidence, with reference to her acts, that the dealings of the husband might be considered a part of her conduct with regard to the property; and therefore that sort of evidence would be admissible against her. It was also stated at the bar, that she has permitted a creditor, in more instances than one, to take execution out of this property. That is a very material fact; but to be stated with some qualification. It is evidence that she did not believe the property to be her's; but not conclusive evidence. She might let a part of her own property go to discharge a particular debt, by which she saw her husband pressed. That fact, therefore, ought to be examined before it can be considered as having much influence one way or the other. It is very difficult to find the means of taking the opinion of a Court of law in this particular case."

The order was, that it should be admitted that the Sheriff returned *nulla bona*; that an action should be brought in the Court of Common Pleas for that return; and Lady *Arundell* and the trustees should be at liberty to defend it; but in consequence of a fund having been provided for Lord *Arundell's* creditors, an end was put to all further proceedings, and the case never came before the Court of Common Pleas. (*Atherly on Marr. Settlements*, 172.)

19. The modern English decisions seem to maintain a determined conflict with the strong rule in *Edwards v. Harben*. That case came under review in *Steward v. Lombe*, (1 *Brod. & Bingh.* 506.) In that case the Sheriff had taken a windmill in execution against one *W. B.* who was in possession of it with the farm on which it stood. *W. B.* had before mortgaged the farm, describing it as one "on which he had lately erected and placed a windmill." And in the same deed sold the windmill to the mortgagee, *habendum, &c.* forever, *proviso* that if the debt 1095*l.* should be paid at such a day, the deed to be void. No change of possession of the farm or mill followed. The mill was so constructed as to be removable at pleasure; and in an action by the mortgagee against the Sheriff, the jury were directed to answer two questions; whether the mill was a mere chattel, and whether the property in it passed to the plaintiff, he never having taken corporal possession? The jury found that the mill was a chattel but gave a verdict for the plaintiff, damages 270*l.*

On a motion for a new trial, *Edwards v. Harben*, (2 *T. R.* 587) alone was cited for the defendant, and *Kid v. Rawlinson*, (2 *B. & P.* 59.) and *Horn v. Baker*, (9 *East*, 215) for the plaintiff.

DALLAS Ch. J. (after examining the question whether the mill was a fixture) said, "the next question is, whether, taking it to be a chattel, there has been such a possession of it as will pass the property? Now this is not a case in which a separate and actual possession could have been ta-

ken ; for, whether the mill was legally a fixture or not, it was, at all events actually fastened to the land, and it was not to be expected, that the mortgagee should come to reside in a mill. Still, it is said, that according to the case of *Edwards v. Harben*, actual possession is necessary to transfer the property in a chattel. Before we consider that case, it may be observed, that this question does not arise upon the bankrupt law ; it is not a case in which possession and visible ownership by a bankrupt has tended to procure him an unmerited credit ; and even if it had been a case within the bankrupt laws, it would not have been a case in which the appearance could excite a false credit. This, however, is a case between mortgagor and mortgagee.

The case of *Edwards v. Harben* has been disented from often. In *Kidd v. Rawlinson*, Lord Eldon, Ch. J. cites and sanctions the following passage from *Buller's Nisi Prius*, (258) "The donor continuing in possession is not, in all cases, a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time, takes a bill of sale of them for securing the money." *Kidd v. Rawlinson* was a case of a bill of sale ; but the party taking the bill, having permitted the party giving it to remain in possession, it was held, nevertheless, that the property remained in the party who received the bill. The present case is that of a mortgage, where the mortgagee, in conformity with the usual practice in such matters, permits the mortgagor to remain in possession. In the case of *Edwards v. Harben*, the goods were such as pass from hand to hand, and might, therefore, without inconvenience, be transferred into actual possession ; here the chattel is of a very different description. It seems, therefore, that the constructive possession of the land under the deed is a sufficient possession of the mill standing on the land ; and the more so, as this was not an absolute conveyance, but a mere pledge to be kept till money lent on the security of it was repaid. The only possession possible, in such a case, did take place.

PARK, J. "Supposing *Edwards v. Harben* to be law, (though doubts have arisen as to the extent of the doctrine there laid down,) and possession to be necessary to confer the property in this mill, there has been such possession as was admitted by the nature of the case, which is very different from the case of goods capable of being transferred from hand to hand ; the possession of these by a supposed vendor, after sale, may be a badge of fraud : but would it not be ridiculous if the mortgagee should be required to come from another part of the country, and turn miller in order to take possession of his security ? This is a mortgage of land, by a party who is in the actual occupation of a mill, and if he relinquished his occupation, it would probably defeat all the ends of his mortgage. No false credit has been created by the transaction, and therefore the verdict must stand for the plaintiff."

BURROUGHS & RICHARDSON, Js. were against a new trial mainly upon the ground that *quodam modo*, the mill was annexed to the land ; and Richardson, J. added, "That actual possession is not in all cases necessary to transfer the property of chattels, appears from *Kidd v. Rawlinson*, and *Wat-*

UTICA,
Aug. 1834.

Bissell
v.
Hopkins.

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

kins v. Birch, (4 *Thunt.* 823.) The mill could not have been moved without inconvenience, and the mortgagee could only take actual possession by entering on the land unnecessarily, or by occupying the mill to his own personal inconvenience; it was therefore perfectly consistent with the whole nature of the transaction, that the mortgagor should remain in possession."

New trial denied.

It is proper here to remark, that in *Steel v. Brown & Parry*, (1 *Thunt.* 381.) *Lawrence*, J. said, "*Edwards v. Harben* is good law, though not applicable here."

20. Exceptions to *Edwards v. Harben* are multiplying in this country. In *Bartlett v. Williams*, (1 *Pickering's Rep.* 238.) *A.* gave a bill of sale of a vessel to *B.* and *B.* promised in writing to reconvey upon the payment of a promissory note due from *A.* *B.* however did not take possession until 8 months after the delivery of the bill of sale. Held, nevertheless, that *B.'s* title was good against an attachment made by a creditor of *A.* after such possession taken. *Putnam*, J. who delivered the opinion of the Court, recognizes *Edwards v. Harben* as sound law; "but there," he says, "the vendee did not obtain possession under the bill of sale, before the right of the creditors of the vendor accrued;" and he relies for the distinction upon *Robinson v. Donell*, (2 *B. & A.* 134;) and particularly the remarks of *Bayley*, J. who says that, "where there was a deed executed, under which it is competent for a party to take possession immediately, and he does not do so, but omits it for six months, he was not aware of any case which decides that such omission would be fraudulent, so as to make the deed void under the statute of *Elizabeth*. If, indeed, the right of a third person had intervened, the deed might be void as against him." *Putnam*, J. continues, "The vessel was liable to the attachment until the title of the vendee was completed by possession. That was the only objection which a creditor of the vendor could have made; and that objection was removed before the vessel was attached. "*Quod nullo interno vitio laborat, at objecto impedimento cessat. remoto impedimento per se emergit.*" He had before remarked, "that the possession of the vendor after the bill of sale, unexplained, would render the conveyance void as against creditors; but such a possession may be explained as in *Kidd v. Rawlinson*, (2 *B. & P.* 59,) and be perfectly consistent with justice." The only explanation given in the case was, that the bill of sale was a mortgage to secure a sum of money. The money was payable on demand, and, indeed, except in the single particular, that the vendee got possession in fact before the Sheriff, the case was in all its features much like the principal one of *Bissell v. Hopkins*. The ship was in port at the time of the mortgage, and the possession might have been immediately changed. That a change of possession need not accompany a mortgage, has been again and again decided in *Massachusetts*.

21. In *Bedlam v. Tucker*, (1 *Pickering's Rep.* 389,) the question was again before the Supreme Court of that state. The debtor mortgaged a brig to secure a subsisting debt with future advances; and the bill of sale

contained a stipulation that the brig should remain in possession of the mortgagor till default of payment; and it was attached at the suit of the mortgagor's creditor before any change of possession or demand of possession. It is true, the brig was at sea, when the bill of sale or mortgage was executed; but *Wilder J.* who delivered the opinion of the Court, (*id.* 397.) drops this circumstance, and considers the naked question, whether the possession of the mortgagor pursuant to a stipulation in the deed can, in any case, be considered evidence of fraud. "But," says he, "It has been argued that the clause respecting possession was fraudulent as against creditors. No case, however, can be found in support of this objection. Similar stipulations in mortgage deeds are not uncommon, nor can they be considered unreasonable. Where, by the terms of the conveyance, the vendee is not to have possession until the performance, or non-performance of a certain condition, there the vendor's continuing in possession, is no evidence of fraud, because it is consistent with the trust appearing on the face of the deed, and is not to be presumed to give a false credit to the vendor. 'Such possession,' says *Buller, J.* (*Edwards v. Harben*, 2 D. & E. 596,) 'comes within the rule, as accompanying and following the deed.' (*Stone v. Grubham*, 2 Bulstr. 228. *Bucknal v. Roiston*, *Pres. Chan.* 285. *Jarman v. Wollaton*, 3 D. & E. 620. *Barrow v. Paxton*, 5 John. Rep. 258. *Kidd v. Rawlinson*, 2 B. & P. 60. *Cadogan v. Kennet*, *Courp.* 432.) There are many cases on this point, but the principle now laid down, has never been questioned.

"An objection has also been made to the stipulation in the mortgage deed, for the security of future advances and responsibilities. Such a stipulation may have a fraudulent aspect, or may be satisfactorily explained, according to the attending circumstances. Where a mortgage is made merely to secure future advances, without any other consideration at the time, it might be void against creditors, as tending to facilitate collusion, and enabling the mortgagor to get credit on his property, without any notice that it was incumbered. But if the object of the mortgage be, as it was in the present case, to secure an existing demand, the addition of a clause protecting future advances, would not necessarily avoid the mortgage.

"As to this point, and several others already noticed, the case under consideration cannot be distinguished from that of *Atkinson v. Maling*, (2 D. & E. 462.) That was a case depending on a mortgage made for securing an advance, and such further sums as the mortgagee might afterwards advance; with a clause that until default of payment should be made, it should be lawful for the mortgagor to hold the ship, and take the profits for his own use and benefit. Much stress was laid in the argument on the clause for the security of advances to be made subsequently to the mortgage; but the Court held that there was no objection to it, and that the mortgage was valid, notwithstanding that clause, and the one respecting the possession.

"All these objections to the mortgage, therefore, are unavailing. And if the mortgagees had appeared chargeable with neglect, in not taking

UTICA,
Aug. 17th 24.

Bissell
v.
Hopkins,

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

possession seasonably, it would have been only evidence of fraud, and might have been explained, if submitted to the consideration of the jury. It has been always held in this state, that the possession of the vendor after sale, is only evidence of fraud, and not such a circumstance as, *per se*, necessarily invalidates the sale."

He then proceeds to consider another question, important to the creditor of a mortgagor; and which, I believe, has not before been raised, i. e. whether the goods can be taken in execution subject to the incumbrance? "They must," says he, "be the property of the debtor, and the attaching officer must have the right to seize them, and to hold possession, so that they may be finally taken in execution. Now there is no substantial difference, at common law, between a mortgage of real estate, and of a chattel. In both cases, the property vests in the mortgagee, subject to be defeated by the performance of the condition; and on the forfeiture or non-performance of the condition, his interest becomes absolute. (*Powell on Mortgages*, 3, 4.) It is therefore manifest, that the attaching officer had no legal right to seize the vessel, as the property of the mortgagors; and that his attachment of the shares mortgaged was void. The same principle applies to pawns; for if goods be pawned, and afterwards a judgment is recovered against the pawner, the goods cannot be taken in execution, until the money is paid or tendered to the pawnee. (*The King v. Henger*, 3 Bulstr. 17. *Bro. Abr. Pledges*, &c. 28. 2 *Bac. Abr.* 715, *Execution*, (C.) 4.)

"A mere equitable interest cannot be taken and sold on execution; for where there is no legal right, there is no legal remedy. This was settled on great deliberation by the Court of King's Bench, in the case of *Scott v. Scholey et al.* (8 East, 467;) and the reasons there given, are entirely satisfactory. The judgment of the Court in that case, was sanctioned by the Court of Common Pleas, in the case of *Metcalf et al. v. Scholey et al.* (5 B & P. 461.) and is supported by all the authorities.

"It is only by statute, that equities, or rights to redeem, are subject to attachment by ordinary process, and no statute has authorized the attachment of such interest in personal property. A creditor can reach such an interest of his debtor only by resorting to a Court of Equity, where he may be let in to redeem incumbrances, (*Shirley v. Watts*, 3 Atk. 200.) unless perhaps he may first remove the incumbrance, and then lay an attachment on the property, as to which, however, we give no opinion. But until payment, or a tender of payment, of the money due to the mortgagee or pawnee of the goods and chattels, it is very clear that the creditor of the mortgagor or pawner has no remedy against them by attachment and execution.

A mortgage of goods, as to the possession continuing in the mortgagor, has been considered by several of the state legislatures, on the same footing with a mortgage of lands; and provision by statute accordingly made for recording the mortgage in both cases. Such was the law of *Virginia*, as appears by *Clayborn v. Hill*, (1 *Wash. Rep.* 177.) There it is valid, if recorded, otherwise not, where the possession continues with the mort-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins

gagor. (*id.*) But in relation to absolute unconditional sales, the doctrine in *Edwards v. Harben*, and *Hamilton v. Russell*, is maintained in its highest tone, i. e. that retaining possession is, *per se*, *fraudulent in law*, not merely evidence of fraud. (*Fitzburgh v. Anderson*, 2 Hen. & Munf. Rep. 302, 3, per Roane, *J. Alexander v. Deneale*, 2 Munf. 341. *Williams v. Farley*, *Gilmer's Virgin. Rep.* 15.) On the other hand, where a statute provides that bills of sale shall be registered, the mere circumstance of recording will not be conclusive evidence of good faith; but the sale may be impeached for fraud notwithstanding. Such is the law of *Maryland*, where, it seems, the statute requires even an absolute bill of sale to be recorded; yet the vendor's continuing in possession, is evidence of fraud. (*Garrett v. Hughtell*, 1 Harris & Johnson's Rep. 3.) In *North Carolina*, where, it seems, the same statute regulation prevails, (*Hodges v. Blount*, 1 Haywood's Rep. 414, 415, per Cur.) the authority of *Edwards v. Harben*, is denied, and possession declared *prima facie* evidence of fraud merely; (*id. Vick v. Keys*, 2 Haywood's Rep. 126. *Falkner v. Perkins*, *id.* 224) while that case has been adopted in its greatest extent by the Judges of *Tennessee*. (*Raygan v. Kennedy*, 1 Tenn. Rep. 97.) So in *South Carolina*. (*Kennedy v. Ross*, 2 Rep. Constitutional Court, S. C. 125.)

22. Another exception to the rule that possession is evidence of fraud, is established in this state, by *Vredenburg v. White & Stout*, (1 John. Cas. 156.) There an insolvent assigned all his effects to a trustee for the benefit of his creditors; but retained possession with the consent of the trustee, who advertised the goods for sale immediately; but before the day of sale, they were levied upon at the suit of a judgment creditor. The sale was holden valid, the possession being consistent with the real intent of the assignment.

23. In *Butts v. Swartwood*, (2 Cowen's Rep. 431.) the vendee bespoke a bureau of the vendor, who was a cabinet maker; he completed the article, and for fear it should be taken in execution, sent to the vendee, who came and took a delivery, but removed it from the shop of the vendor to his house to be trimmed and remain till snow came, so that it might be removed by a sleigh. A constable levied upon the article by virtue of an execution against the vendor, and the vendee recovered the value in trover, the sale being holden valid, and a possession thus explained no evidence of fraud.

24. When to these we add the exception mentioned by the Chief Justice, as having been established in *Brooks v. Powers*, (15 Mass Rep. 244.) when we look at the nature of the 24 different exceptions to the rule in *Edwards v. Harben*, which are above enumerated, it is time to ask, what does the rule amount to? What is it worth? And does its preservation merit a struggle? Some of the exceptions are almost as broad as the rule itself. The nature of the instrument of sale, the kind of sale, whether directly between the parties, or on execution, or distress for rent, necessity, convenience, customs of doing business, the nature, quantity, relative value, distance, and place of the articles sold, the consideration, the relation of the parties, honesty, fairness, humanity, friendship, special circumstances, special reasons, &c. &c. have, in

UTICA,
Aug. 1824.

Bissell
v.
Hopkins.

their turn, been called in by the different cases to fritter down the rule. Sometimes the attempt to apply it strikes the Judges with such evident absurdity, that they no longer proceed by way of exception. Instead of attempting to untie, they cut the knot at once by denying the existence of the rule. Such was the case in *Steward v. Lombe*, cited above, from 1 *Brot. & Bing.* 506. The counsel must have supposed it a strong rule indeed, when they asked the Court to use it for the Quixotic purpose of attacking and carrying a wind mill from one part of the kingdom to another. But the rule is worth the less, because if you allow one half the exceptions which appear to be established, it can always be evaded. If the sale is to be absolute, it may be done through a voluntary judgment and execution; if conditional, by a bill of sale in nature of a mortgage. Surely the Court act with judgment in *Brooks v. Powers*, when they say a voluntary and judicial sale are the same thing in effect. They do so by allowing possession to remain for an honest purpose after a voluntary sale. Had they said otherwise, they would afterwards have been baffled in a like case by the mere form of a distress for rent, or a sale upon a voluntary judgment; or a mortgage of the oxen to secure the rent due or to become due.

It is not to be denied, that in relation to voluntary, direct and absolute bills of sale, the Judges of the King's Bench have adhered to the rule of *Edwards v. Harben*, in all its unmitigated severity. In *Paget v. Perchard*, (1 *Esp. Rep.* 205,) tried before *Ld. Kenyon*, in 1794, it appeared that a publican had attempted to secure her distillers by executing to them a bill of sale of all her effects, including liquors in her house, as well as furniture, &c. on the 4th of April; and a person had entered her house at 7 P. M. of that day, and taken possession, but he permitted her to sell liquour during the evening as usual, and to receive the money; and she had not accounted for it. *Ld. Kenyon* said, that allowing her to appear as usual, mistress of the house, and to execute acts of ownership, after having parted with all her property by the bill of sale, was inconsistent with such situation, and a sufficient evidence of fraud as against *bona fide* executions. And the Sheriff having levied the next day, he non-suited the distillers, the vendees, who had brought trover for the goods. Again, in *Wordall v. Smith*, (1 *Campl. Rep.* 332,) before *Ld. Ellenborough*, in 1808, even in an action for a false return upon a *fi. fa.* against the Sheriff for not levying an execution against one *Mason*, on certain goods, being his household furniture and stock in trade, as a publican; it appeared that before the issuing of the *fi. fa.* he had given a bill of sale of these goods to one of his creditors, who immediately put his servant into the house; but *Mason* and his wife continued to carry on the business as usual, for several weeks after; during which time, with the assent of the servant employed to keep possession, they sold beer and put the money into the till, to which they had access. And, per *Ld. Ellenborough*, "To defeat the execution by a bill of sale, there must appear to have been a *bona fide*, substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owners of the goods. A concurrent pos-

UTICA,
Aug. 1824.

Bissell
v.
Hopkins

session with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors." These were *nin prius* cases; and it might be sufficient to remark, that neither of them was a mere unmixt case of possession. In addition to possession, strong and distinct acts of ownership were permitted, and in the last case this continued for a considerable time. In the first, the bill of sale was, moreover, general, probably *not even excepting the donor's apparel*. These were relied on as strong marks of fraud in *Twyne's* case. Ld. Kenyon puts *Paget v. Purchard*, upon these acts of ownership, in addition to which he was doubtless influenced by the generality of the gift. And though Ld. Ellenborough, in the last, lays the main stress on possession, yet this was not necessary; for *Twyne's* is a point blank case to overthrow the gift upon the acts of ownership. The learned editor of *Espinasse's Reports*. (Mr. Day) in a note to *Paget & Purchard*, takes occasion to advert to *Hamilton v. Russell*, (1 Cranch, 310,) and he says no other case goes so far as to say that possession is *itself a fraud*. He considers *Kidd v. Rawlinson*, opposed to that position. This note was published in 1808. I imagine it will be found that the weight of authority since that time, decidedly sustains *Kidd v. Rawlinson*; and even goes far beyond that case, in sanctioning a mere possession continued in strict and open subordination to the rights of the vendee.

But whichever way the decisions may tend upon the question of possession in the vendor, after a voluntary, direct and absolute bill of sale; so far as the statute of *Elisabeth* is concerned, (*and vid. farther*, 1 Gall. Rep. 422, per Story, J. and 1 Halst. N. J. Rep. 155,) no doubt can be entertained at this day, that a continued possession in a mortgagor of chattels is not, *per se*, evidence of fraud, either as to purchasers or creditors. So long ago as *Lady Lambet's case*, (*Shep. Touch.* 67,) this was settled in relation to chattels real. A termor had mortgaged his term for years to B, upon condition that if he repaid the money to B a year after, he should re-enter, and B covenanted that the mortgagor should take the profits of the land until that time, &c. The mortgagor did not pay, and B, hoping that he would pay in time, suffered him to continue in possession, and take the profits two or three years after; and in the interim, judgment and execution was obtained against the mortgagor. Held, that execution should not be made of this lease, for the mortgage should not be said to be fraudulent as to the creditor: and when a conveyance is not fraudulent at the time of making it, it shall never be said to be so for any matter *ex post facto*.

That mortgages of personal chattels have been of long and extensive practice in this state; and considered, with reference to possession, much in the same light with real estate or chattels real, and subject to much the same evils, appears by an old colonial statute, passed December 31, 1786. (*Van Schaick's ed. of Col. Statutes*, 524.) This act recites, that divers frauds had been committed in *Dutchess, Richmond, Orange and Queens* counties, by persons mortgaging their goods and then selling to others, ignorant of the mortgage; and provides, that such mortgages, not under the

UTICA,
Aug. 1824.

Adkins
v.
Brewer.

value of £5, nor over £100, should be inoperative as to subsequent purchasers, unless oath was first made before a magistrate that it was not given to defraud; and the mortgage was thereupon recorded in the town clerk's office, &c. This act expired by its own limitation, in 1771; and has not been renewed. I before remarked, that permanent provisions of a similar character have been made upon this subject, in several of the states. The statutes of *Virginia*, *North & South Carolina*, and *Georgia*, may be seen in a digest of the laws of those states, concerning conveyances, in a supplement to *Sheppard's Touchstone*, by Mr. Anthon, pp. 467, 501-2, 543-4, 467.

ADKINS against BREWER and HARVEY.

To give a justice jurisdiction of a cause upon attachment, proof must be made that the defendant is concealed, or has departed, &c. And if the attachment issue without such proof, and be executed, the whole proceeding being void, the justice and the plaintiff are trespassers.

So, come sensible, if security by bond be not given, or mere blank bonds executed by the surety.

ON error from the *Otsego* Common Pleas. The action in the Court below was trespass by *Adkins* against *Brewer & Harvey*, for taking, and carrying away, and converting the goods and chattels of *Adkins*. Plea, not guilty. The cause came on to be tried in *February* term, 1822, when the plaintiff called one *White* as a witness, who testified that he went, at the request of *Harvey*, to the office of *Brewer*, who was a Justice of the Peace, in order to become bail for *Harvey*, to procure certain attachments against *Adkins*, which *Harvey* contemplated taking out; that the witness, in conjunction with *Harvey*, signed, sealed and delivered printed blank bonds for that purpose; that one of them was either partially or totally filled up before its execution; that three others were signed, sealed and executed in blank; (these were then produced, and appeared still to be blanks) that the witness was in a hurry, as well as *Harvey*; that the witness delivered the bonds to *Brewer*, the Justice, with directions to fill them up;

In trespass against a justice for issuing attachments and executions, &c. which were void, it appeared that the constable, who levied and sold under these, had several other executions, older than the void ones, upon which he levied and sold at the same time, and the sale was under all the executions indiscriminately; but the void executions, as well as the others, were satisfied by the sale, and the money paid to the plaintiff; held, that trespass lay against the justice and party.

When the justice wants jurisdiction, he is liable as a trespasser: otherwise, where he has jurisdiction, and errs in the exercise of it.

In trespass against an officer, for issuing process, by virtue of which the plaintiff's goods are taken, to justify the taking, the officer must shew affirmatively, on his part, that he had jurisdiction; especially where, from the plaintiff's proof, there is reason to presume that the proper steps were not taken to confer jurisdiction.

that *Brewer* was then filling up an attachment. The counsel for the defendant, on notice, produced but one attachment. The counsel for the plaintiff then gave in evidence three several executions, issued upon three several judgments, by *Brewer* against *Adkins*, in favour of *Harvey*, and also proved that the property in question was sold by one *Holden*, a constable, by virtue of an execution in favour of one *Aaron Bigelow*, and seven executions in favour of *Selah Havens*, all older than *Harvey's*, as well as by virtue of the several executions issued by *Brewer*; that about \$102 of the money raised by the sale, was paid to *Harvey*, upon his executions, which were issued on judgments rendered upon attachments where no bonds had been filled up, or executed, otherwise than as above stated.

The counsel for the defendant thereupon moved for a nonsuit, which was opposed, on the ground that there was no evidence of any proof of the absence or concealment of the plaintiff having been taken at the time the attachments issued; and that no bonds were taken pursuant to the 23d section of the 25 dollar act; that the defendants were, therefore, trespassers: but the motion was granted by the Court below, on the ground that the judgments were voidable only; and that, inasmuch as it appeared that the constable's sale was made on a variety of other executions, as well as *Harvey's*, without discrimination, trespass would not lie. To this opinion the plaintiff excepted.

UTICA,
Aug. 1824.

Adkins
v.
Brewer.

S. M. Hopkins, for the plaintiff in error, cited 1 *R. L.* 398. s. 23; *Vosburgh v. Welch*, (11 *John. Rep.* 175) *Curry v. Pringle*, (*id.* 444) *Percival v. Jones*, (2 *John. Cas.* 49) *Case v. Shepherd*, (*id.* 27) *Bigelow v. Stearns*, (19 *John.* 39) *Collins v. Ferriss*, (14 *John.* 246) *Cable v. Cooper*, (15 *John.* 152) 1 *Phil. Ev.* 150.

I. Seelye, contra, to shew that the law would presume the proper proof to have been taken before the attachments issued, cited *Van Dyck v. Van Buren*, (1 *Caines' Rep.* 84) *England v. Slade*, (4 *T. R.* 682) *Jackson v. Woolsey*, (11 *John. Rep.* 456, per *Yates, J.*) *Gray v. Garder*, (3 *Mass. Rep.* 399) *Coleman v. Anderson*, (10 *id.* 105) 1 *Phil. Ev.* 150, 151, 2d

UTICA,
Aug. 1824.

Adkins
v.
Brewer,

Am. from 3d Lond. ed. ; *The King v. Hawkins*, (11 East, 216, per *Ld. Ellenborouh*, Ch. J.) *Powell v. Milbanke*, (3 Wils. 362. 366) 2 Bl. Rep. 852, S. C. ; *Williams v. The East India Company*, (3 East, 192) *Monk v. Butler*, (1 Rol. Rep. 83) *Dr. Harscot's case*, (Comb. 202) Bull. N. P. 298 ; *Evans v. Birch*, (3 Campb. Rep. 10, 12) *Peak. Ev.* 5 ; *Hartwell v. Root*, (19 John. 345).

He said that all the executions, except three, were admitted to be regular ; and the sale being upon them all, indiscriminately, trespass would not lie. The action should have been case. The proceeding is like taking an excessive distress, for which trespass will not lie. A party having two authorities may justify under one, though the other be void. (*Crother v. Ramshotom*, 7 T. R. 654, per *Lawrence*, J. *Grenville v. The College of Physicians*, (12 Mod. 386, per *Holt*, Ch. J.) And as to the remedy by trespass, he cited *Hutchins v. Chambers et. al.* (1 Burr. 579) *Lynne v. Moody*, (2 Str. 851).

Though there were no bonds, this was error merely ; and the attachments, therefore, not void for this reason, but voidable only. (*Buller v. Potter*, 17 John. 145. *Prigg v. Adams*, 2 Salk. 674).

Though the attachment had been on the oath of the party, it would have been error merely. (*Steenburgh v. Korts*, 10 John. Rep. 167.) So, if without oath.

Curia, per SAVAGE, Ch. J. The defendants are called on directly, not collaterally, to shew why they have undertaken to dispose of the plaintiff's property. They must then show a lawful authority. A power to act is the first thing to be shewn by a Court of limited and special jurisdiction. To give the Justice jurisdiction, it must appear that the person against whose property an attachment is sought, is either concealed within the county, with the intent mentioned in the act, or has departed, or is about to depart the county, with the like intent.

In *Van Steenburgh v. Korts*, (10 John, 169) the Court seem to consider the proof of this necessary to confer jurisdiction ; and *Spencer, J.* takes the distinction between proof

before a Court which is to *give* it jurisdiction, and before a Court that already *has* jurisdiction.

In *Vosburgh v. Welch*, (11 *John.* 175) the Court say, the Justice must be considered as having issued the attachment without any proof whatever of the departure or concealment required by the act ; and, of course, without authority. The rule as to the Justice's liability, is, that when he has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*, and void—equally so as if he was not a Justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable—in the latter not. (17 *John.* 146. 2 *John. Cas.* 27. 14 *John.* 246. 19 *John.* 39.)

I do not consider this case as coming within the rule that an officer is presumed to have done an act, the omission of which would render him liable for negligence. There is presumptive proof, at least, that no evidence was taken by the Justice, and positive proof that no security was taken, except in one cause out of four. The sale by the constable, after the other executions were satisfied, could not be justified, except upon the authority of these executions ; and as they were void, there was no authority whatever : all persons concerned were trespassers.

The judgment of the Court below must be reversed.

Judgment reversed.

UTICA,
Aug. 1824.

Adkins
v.
Brewer.

UTICA,
Aug. 1824.

Whitney
v.
American
Insurance
Company.

WHITNEY against THE AMERICAN INSURANCE COMPANY.

The contract in a valued policy is to pay the assured the whole valuation, if the subject of the policy be lost; and the valuation in the policy is conclusive as to the amount of recovery, if the subject be lost by the perils insured against, unless there be fraud or imposition in fixing the value.

Where the insurance was of goods, valued at \$14,000, on board a ship and the returns of those goods on a voyage out and home; and the goods in the course of the voyage round were delivered to L. upon his advance of \$7,000, and his receipt, promising to answer drafts of the assured to \$3,000 more; the

goods to be sold by L. for his re-imbursement and the proceeds remitted to the assured; and the \$7,000 were vested in a return cargo, together with \$1621, for which he drew on L. making in the whole an investment to \$8469.35; and L. paid the draft as he had agreed; and the return cargo was lost by the perils insured against; and the outward cargo, on actual sale, did not bring enough to re-imburse L. by \$4680.26, for which he drew on the assured; *held*, that the assured was entitled to recover, as for a total loss, the \$14,000, and interest.

But it would be otherwise, if part only of the value of the goods had been invested in the return cargo.

ASSUMPSIT on a policy of Insurance, tried the 13th April, 1822. at the *New-York* sittings, before Mr. Justice WOODWORTH; when a verdict was taken, by consent, for the plaintiff for \$20,000, subject to the opinion of the Court, and to adjustment, upon the following case, with liberty to either party to turn it into a special verdict or bill of exceptions.

The policy was dated July 7th, 1818, and was effected by the plaintiff in his own name, and upon his own account, and underwritten by the defendants, upon all kinds of lawful goods and merchandizes, laden or to be laden on board the ship *America*, *Vibberts*, master, on a voyage at and from *New-York* to *Bourbon*, with liberty to use the *Isle of France*, and two ports in *Java*, and back to a port of discharge in the *United States*, and with liberty to use either port first, being upon 137 whole, and 48 half pipes of wine out, and returns home, valued at \$14,000, being the sum insured, at a premium of 6 per cent. to return one half per cent. for each port not used, and the risk ending safely. By a memorandum endorsed on the policy, signed by the defendants, and dated the 21st day of July, in the same year, in consideration of an additional premium of one per cent. permission was given by the defendants to use *Calcutta*, without prejudice to the policy, the one per cent. to be returned, if the permission should not be used.

The policy, in all other respects, was in the usual printed

form of policies commonly used in the city of *New-York*, and either party had permission to refer to it upon the argument.

On the 3d of *July* in the same year, the plaintiff shipped, and laded on board the *America*, in the port of *New-York*, for his own account, the wine specified in the policy, the invoice cost of which was \$14028,87, and took from Capt. *Vibberts* a bill of lading, under that date, for the wine thus shipped, deliverable at the Isle of *France* to *Elmslie Garrigues* and *William A. Field* or their assigns, as the consignees, who went out in the *America* as supercargoes upon the voyage insured.

UTICA,
Aug. 1824.

Whitney
v.
American
Insurance
Company.

The ship sailed from the port of *New-York* with the wine on board upon the voyage insured, on or about the 7th of *July* in the same year, and arrived in safety at *Bourbon*, on or about the 21st *October* following, where she remained a short time, and proceeded thence to *Batavia*, being a port in *Java*, at which latter place she arrived in safety, having the insured wine still on board, on or about the 25th day of *December* in the same year.

At *Batavia*, the supercargoes, owing to the depressed state of the market at that time, being unable to dispose of the wine there, unless at a very great sacrifice, made an arrangement with *Abraham E. Loesman* of that place, by which he was to receive the wine for sale, and make an advance upon it of \$7,000, and permit the supercargoes to draw upon him from *Calcutta* to any amount not exceeding \$3000 more, the whole of which was supposed to be less than what the proceeds of the wine would be, he holding the wine for his reimbursement, and accounting to the plaintiff for the proceeds when sold. The wine was, pursuant to this arrangement, landed at *Batavia*, and by the consignees and supercargoes delivered to *Loesman*, who thereupon gave them a receipt in the following words: "*Batavia, January 15, 1819. Received from Elmslie Garrigues & William A. Field, supercargoes of the ship America, of New-York, one hundred and thirty six pipes, and forty-seven half pipes of Catalonia wine, to be sold by me for account of Mr. Stephen Whitney, merchant, New-York, and proceeds to be remitted to him. (Triplicate.) A. E. Loesman.*"

UTICA,
Aug, 1824.

Whitney
v.
American
Insurance
Company.

Loesman accordingly advanced in *Batavia*, and upon the receipt of the wine, 6930 Spanish dollars and 69 cents to the supercargoes, for the use and benefit of the plaintiff, which sum, allowing one *per cent.* premium for Spanish dollars, made the sum of \$7000. The supercargoes thereupon gave *Loesman* a receipt for the advance in these words: "*Batavia, January 18, 1819. Received of Mr. A. E. Loesman six thousand nine hundred and thirty Spanish dollars, and sixty-nine cents, which, with one per cent. for Spanish dollars, will make seven thousand dollars.*"

*Elmslie Garrigues, for self &
Wm. A. Field."*

6930 69

69 31

\$7000

The supercargoes, on the same day, shipped and laded the dollars on board the *America*, in *Batavia*, and took a bill of lading therefor, signed by Captain *Vibberts*, deliverable to themselves at *Calcutta*. The ship, with the dollars on board, sailed from *Batavia* on or about the 1st of *February*, 1819, and proceeded direct for *Calcutta*, at which latter place she arrived in safety with the specie, on or about the 28th *March* following.

While the *America* lay at *Calcutta*, the supercargoes received the specie from Captain *Vibberts*, and with it, and the amount for which they drew on *Loesman*, purchased there goods for the account of the plaintiff, the invoice cost of which was \$8469,85; for the difference between which and the advance made by *Loesman*, they drew on him to the amount of \$1621, pursuant to the arrangement between them, and he paid that sum accordingly.

The goods so purchased in *Calcutta* were there by the supercargoes shipped and laded on board the *America*, for which they took Captain *Vibberts'* bill of lading, dated in *Calcutta* the 20th of *June*, 1819, deliverable to the plaintiff, or his assigns, in *Philadelphia*, that being understood and intended as the ship's port of discharge in the *United States*, upon her return. The *America*, with a valuable cargo, including these goods, left *Calcutta* on or about the 1st day of

July following for *Philadelphia* ; and was afterwards, on or about the 19th December following, and before the termination and in the due prosecution of the voyage, cast away and totally lost near *Sandy Hook* by means of the perils insured against.

Loesman subsequently sold the wines deposited with him, which, after debiting the plaintiff with the \$7000 advanced, and the \$1621 drawn for by the supercargoes, and crediting the plaintiff with the nett proceeds of the wine, left a balance due from the plaintiff to *Loesman* of \$4680,26, for which amount he drew upon the plaintiff.

G. Griffin, for the plaintiff, took two grounds ; 1. That the policy being a valued one, and on the voyage round, the valuation is to regulate the amount of the recovery ; 2. It makes no difference that the return cargo was purchased with monies advanced in anticipation of the sales of the outward cargo, as the whole of its proceeds, and even a greater amount, were, in fact, invested in the return cargo.

1. Insurances, he said, are of two kinds, open and valued. In the latter, the valuation always controls unless there be fraud. (*Lewis et al. v. Rucker*, 2 Burr. 1171. *Feise et al. v. Aguilar*, 3 Taunt. 506. *Miner v. Tagert*, 3 Bin. Rep. 204. *Hodgson v. Mar. Ins. Co.* 3 Cranch, 110, 111, per *Cushing, J.* *The Mar. Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206. *Davy v. Hallett*, 3 Caines' Rep. 16. *Kane v. The Commercial Ins. Co. of N. Y.* 8 John. Rep. 229.) And the fraud must be gross and palpable, like the case put by Lord Mansfield in *Lewis v. Rucker* ; an insurance of £2000, when the insured had no interest beyond a cable. In *The Marine Ins. Co. of Alexandria v. Hodgson*, the difference in value was \$2000, that is, the valuation at \$10,000, and the real value at \$8000 ; yet this striking difference was not admitted in evidence, because there was no fraud. Here goods were shipped beyond the value in the policy. A valued policy upon goods will not be opened where there is no fraud, except in the single instance of leaving part of the goods on shore, upon the same principle that a valued poli-

UTICA,
Aug. 1824.
Whitney
v.
American
Insurance
Company.

UTICA,
Aug. 1824.

Whitney

v.
American
Insurance
Company.

cy upon freight was opened in *Forbes v. Aspinall*, (13 East, 323.)

2. The return cargo was the *returns* of the wines within the language of the policy, and indeed upon the most rigid technical construction of the term. It makes no difference whether the wines were hypothecated or sold, to procure the return cargo. It was not only the same in its legal, but in its actual effect; for the wines were finally sold to pay the money actually invested in the proceeds. *Haven v. Gray*, (12 Mass. Rep. 71) is a case precisely in point for the plaintiff, except in the single particular that the word *proceeds* is used there instead of *returns* as here.

Nor let it be said that this is a hard case. There must be some fixed and uniform rule applicable to both parties. Suppose the case had been the other way, the goods lost far above the value insured, would the Court open the policy for the benefit of the assured? This never would be thought of. *Shawe v. Felton*, (2 East, 109) shows the inflexibility of the rule. The assurers were holden to the value, though the property was deteriorated before the loss, by the act of the assured himself. I appeal particularly to the strong language of Ld. *Kenyon* in that case, (p. 114 & 115.)

J. Duer & D. B. Ogden, for the defendants, made the following points: 1. That the policy never attached upon the goods lost, they not being the returns of the outward cargo; 2. If the defendants are liable, it is only for a partial loss; 3. If the policy be construed to attach upon the goods lost, although not the returns of the outward cargo, the loss should be adjusted as upon an open policy.

They said, the plaintiff claims \$14,000, when, by his own shewing, he has lost but about \$8000. The general presumption of law is, that an insurance is for the mere purpose of indemnity; and where a party sets up an agreement controlling the general intendment of law, he must, as in all cases of a special agreement, bring himself precisely within its terms. What did the parties understand by *wines out*, and *returns home*? It is said the latter words mean any returns. This we deny. It must be returns of

the wines. To constitute this, the wines should be exchanged for, or sold and invested in the return cargo. If any thing else had been meant, would not the parties have said so in their contract? The plaintiff understood the sense of the clause as we do, at the trial; and the struggle was to shew the return cargo purchased on the credit of the outward cargo.

UTICA,
Aug. 1824.
Whitney
v.
American
Insurance Co.

The parties also intended that, to make the policy attach on the return cargo, there should be a *total* shipment of the *whole* proceeds—not a partial one. The contrary course would give rise to frauds innumerable. One fourth in value may be re-shipped,—lost; and the whole original value recovered; and by and by, the residue sold in a foreign country. The underwriters have nothing to do with the market. It was *Whitney's* duty to *sell* the wine, and invest it in a return cargo; for which alone the defendants were liable. An advance of \$10,000 might have been had, for it was offered; but only \$8,000 were received. The truth is, the whole was no more than a loan by *Whitney*, and an after purchase entirely distinct from, and independent of the avails of the outward cargo. The wine was pledged merely as a collateral security; and the receipt concludes with a promise to *remit the proceeds*;—When? Why, *when sold*; and yet it is now contended that, even before the wines were sold, their proceeds had been shipped, and were on their return voyage. The supercargoes then gave a receipt for the money, without saying on what account, and whether on the credit of *Whitney*, or the wines. *Loesman* has since drawn upon *Whitney* for the balance over and above the avails. *Whitney's* personal credit was evidently pledged. Then the money was not the proceeds of the wine, but of *Whitney's* credit. The rights of the parties are to be tested by the state of things at the time the cargo was shipped—not by any thing which transpired afterwards.

It never should be the interest of the assured, that a loss should happen. In *Forbes v. Aspinall*, cited for the plaintiff, a case of valued policy on freight, exactly analogous in principle, the reasoning of Lord *Ellenborough*,

UTICA,
 Aug. 1824.
 Whitney
 v.
 American
 Insurance Co.

Ch. J. meets the present case precisely. "And so, (says he) if, by the perils insured against, the *freight* of *part only* of the goods to be carried be lost, the assured can only recover in respect to that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected, be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship, by accident, takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against, with those 100 on board; can it be contended that the assured shall recover to the full amount of the valuation, that is, for the whole 500, when he has lost only 100? So in the case of freight; if the ship would carry 500 tons, and in fixing the valuation, the assured calculate his freight upon 500 tons, but when he reaches the loading port, he can get 10 tons only upon freight, and sails upon the voyage insured, with those 10 tons only; is it to be allowed, that if the ship be lost by any of the perils insured against, and he thereby loose freight upon 10 tons, he shall be entitled to the valuation, which includes the freight upon 500 tons? And yet to this extent the plaintiff's argument in this case is carried. The proposition is monstrous. Instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen." So here, the plaintiff asks the Court to convert this contract into the risk of a market in *India*; or the circumstance which prevented his getting the full proceeds on board, as a return cargo.

Rather than admit this consequence, the Court will divide the policy, making it a valued one on the outward, but an open one on the return cargo. If the construction contended for by the plaintiff be correct, we should be liable to

UTICA,
Aug. 1824.
Whitney
v.
American
Insurance Co.

the extent of the valuation, though the return cargo should contain but a single bale of goods. Of the value of the outward cargo, the parties always have the means of judging. In this case, all the articles were enumerated. The parties presumed they would continue at the value fixed throughout the voyage. As to this, they ran a mutual risk. After the avails of the outward, are once fairly invested in a return cargo which is shipped, the policy is not to be opened, merely because the latter may be worth less than the former. It was upon this principle, that *Havens v. Gray*, cited for the plaintiff, was decided. (*Philips on Ins.* 311.) We admit that *Havens v. Gray* appears to be against us as to the return cargo being really the proceeds of the outward; yet, however respectable the Court by whom that case was decided, it is not binding upon this tribunal. This Court will not yield to it as an authority; but only so far as the arguments by which it is supported shall be found convincing.

J. O. Hoffman, in reply. It is very easy to cite and establish the general principle, that insurance is for indemnity merely; but to what extent is the saying applicable? This must depend on the nature of the contract; and accordingly the rule never extends to a valued policy. The valuation is for the very purpose of avoiding the question of indemnity according to the value. In an open policy, the two items of proof are the loss and the value. Upon a valued policy, you stop at the first; for the agreed valuation is the measure of damages. In this valuation, it is right to include certain charges which would not be reached by an open policy, and you may anticipate port charges, extraordinary duties, commissions, and even freight. The whole may be covered by the valuation. Hence the principle that nothing shall avoid the valuation short of fraud. (*Philips on Ins.* 306.) Even gaming policies are allowable in this state: for the statute, 19 Geo. 2, has not been enacted here. All the law on this question, will be found collected in *Philips on Insurance*, 307.

I admit, as a general principle, that the underwriter is

UTICA,
Aug. 1824.

Whitney

v.

American
Insurance Co.

not to be affected by the fall of the market. But I deny that the rule extends to a valued policy. Here, even the market may be insured.

I admit that the valuation was on the outward cargo, and I agree, that if only part of the returns were on board at the time of the loss, the plaintiff is entitled to no more than a *pro rata* allowance. But the entire proceeds were on board. I am at a loss to discover how, when the advance is on the credit of the fund, you can distinguish it from the proceeds of the fund. There can be no doubt that the credit of the wines was employed. They were deposited as security. If the advance had been on *Whitney's* personal credit solely, I agree that it could not be considered the *returns* or *proceeds* of the wines. But the outward cargo was applied in payment. *Loesman* received it for sale, made an advance of \$7000, and authorized a draft for the whole; and a partial draft was answered, *conformably to the arrangement*. So says the case in terms. It might as well be said that money is advanced on the *personal* credit of a mortgagor, or by a factor who holds the goods of his principal, or by a consignee of goods under the usual agreement to answer drafts for $\frac{2}{3}$ of the value. Were we bound to take the market as we found it, and make an absolute sale at a sacrifice? or lie by and wait for a market till the vessel rotted? No. The object was a speedy sale and investment, if to be had. According to gentlemen, we could even recover back the premium, because no risk on the return cargo ever commenced. The ground taken, certainly leads to this extravagant consequence. No. The object of all was, that a home investment should be as large as possible. Had we sold for a trifling sum, the defence would have been fraud in the sale.

But the question is with us upon authority. *Havens v. Gray* has been questioned; and to this has been opposed the authority of Lord *Ellenborough*, in *Forbes v. Aspinall*. If there be any difference in the two cases, *Havens v. Gray* is as binding here as *Forbes v. Aspinall*. The former was decided at *nisi prius*, by that great master of commercial law, the late Ch. J. *Parsons*; and his decision was

sanctioned by the learned Judges of the Supreme Court of *Massachusetts*, after full deliberation, in the time of his successor, Ch. J. *Parker*. And the opinion will be found fully sustained by the reasons assigned for it.

UTICA,
Aug. 1824.

Whitney
v.
American
Insurance Co.

Curia, per SAVAGE, Ch. J. The contract in this valued policy is, "that the goods shall come safe to the port of delivery; or, if they do not, to indemnify the plaintiff to the amount of the prime cost, or value in the policy." (2 *Burr*. 1172, per *Ld. Mansfield*.) The valuation is admitted in the policy: it is the amount to be recovered, if the property insured is lost by the perils insured against. (*Philips on Ins.* 307. 3 *Taunt.* 506. 6 *Cranch*, 220-1. 3 *Caines' Rep.* 20. 3 *T. R.* 362.) And this value is conclusive upon the underwriters, when there is no suggestion of fraud or imposition. (*id.* 8 *John. Rep.* 234. 2 *East*, 109. 2 *Campb.* 69.) There is no question, in this case, that the whole quantity of wine insured was on board during the outward voyage; and an amount beyond its avails was invested in the return cargo. The exception, therefore, established by *Forbes v. Aspinall*, (13 *East*, 323) where part, only, of the goods insured are on board, at the time of the loss, does not apply.

Had the wines themselves been lost on the outward voyage, there could be no doubt as to the amount of the recovery; but the loss was of the return cargo. The insurance being upon the wine out, and returns home, valued at \$14,000, the remaining question, and the principal one made at the bar is, whether the goods lost were the returns of the wine? Had the wine been sold for \$7,000, and the return cargo purchased with the avails, there is no doubt the defendants would have been liable under the authorities cited, for the whole \$14,000. Now, whether the money was paid by *Loesman*, on a sale of the wines, or advanced on a pledge of them, makes no sort of difference to the defendants; though it would be otherwise, if the advance had been less than the value of the wine—one half, for instance. In such a case, if the plaintiff were permitted to recover to the extent of the valuation, he would compel the defendants to pay for the whole of his wine, and yet would have the one half safe at *Batavia*. It should appear, therefore, that

UTICA,
Aug. 1824.

Jackson
v.
Allen.

the whole proceeds of the wine were invested in the goods lost. The policy then attaches for the whole, though it may be more than a mere indemnity. (*Hatens v. Gray*, 12 *Mass. Rep.* 76.)

Although when the \$7,000 were advanced, the wine was supposed to be worth more than \$10,000, yet the actual sales were subsequently made for less than \$4,000. The whole proceeds, therefore, or *returns* of the wine, and more, were invested in the goods lost. I cannot consider the \$8,621, advanced by *Loesman*, as loaned upon the plaintiff's personal credit. *Loesman* advanced the money upon the deposit of the wine, and that was all the security he took; no doubt, supposing it amply sufficient to indemnify him, and something beyond, as we find provision made in the receipt for a remittance of the balance. Subsequent events have shewn, however, that the advance exceeded the whole proceeds.

I am, therefore, of opinion, that the plaintiff is entitled to recover the \$14,000, and interest.

Judgment accordingly:

JACKSON, *ex dem.* BLANCHARD, against ALLEN:

B owned an alley 24 feet wide, between two lots, one owned by *A*, and the other by *H*. *A* built a large brick house on his lot, which extended 12 feet across the alley at one end, and *B* built a fence lengthwise of the alley, on a line corresponding with *A*'s house, so as to narrow the whole alley one half or more, which alley, thus narrowed, *B* used as a way. Then *B* gave a lease in fee to *A*, of the whole 24 feet, describing it as a lot on which *A*'s house partly stood, at a rent of \$15, reserving a way through the alley for himself, his teams, carts, &c.; and the lease was declared to be upon condition that *A* should leave *B* in the unobstructed enjoyment of the way. *Held*, that a continuance of the fence, as *B* had himself made it, was not an obstruction of the way, within the words of the condition; that a reasonable way, for the purposes expressed, was all that *B* could exact; and that his acts, in making the fence, and leasing with the house partly across the alley, were facts from which a jury would be bound to consider the alley as it was narrowed by the house and fence, the full extent of the way intended by the parties to be reserved; the lessee having a right to reduce all the residue of the alley to his exclusive possession.

EJECTMENT, for a small lot or *alley*, in the village of *Salem*, *Washington* county, tried before (the late) Mr. Justice *Yates*, at the *Washington* Circuit, June 10th, 1822.

The words, "and these presents are upon this condition," viz. *that the lessee shall suffer the lessor to enjoy a way reserved, through the demised premises, without obstruction, are sufficient, in a durable lease, to make the estate a conditional one, without an express clause of re-entry; and if the way be obstructed, ejectment lies.*

The declaration was entitled of *Thursday, May 4th*, in *May term*, 1820, and the ouster laid on the *3d May*, 1820.

UTICA,
Aug. 1824.

Jackson
v.
Allen.

On the trial, *James Rowan* testified, that the *alley* was laid out by *John Williams*, the proprietor of that and the adjoining lands, as early as 1796. In that year he sold the lot adjoining the alley on the north, to *Becker*, who then took possession of, and sold it to *Crookshank*, who sold it to the defendant, who occupied it ever since. The alley runs from the road east, to the rear of the lots. Several years ago the defendant built a barn on the rear of his lot. In 1806, he built a large brick house on the west end of his lot, adjoining the highway. The lot adjoining the alley on the south was sold by *Williams* to *Peebles*, who built upon it, and in 1800, *Hawley* built a barn in the rear of that lot, he then owning it.

The plaintiff then gave in evidence a lease in fee from *Blanchard*, (the lessor of the plaintiff) to *Allen*, (the defendant) dated *Dec. 13, 1809*, by which *Blanchard* granted, bargained, sold, aliened, remised, released and confirmed to *Allen*, his heirs, &c. the *alley*, by the description of "all that lot, &c. situate, &c. beginning at the N. W. corner of the lot lately belonging to *Hawley*, &c. then northerly to the S. W. corner of the lot heretofore granted to *Allen*, (the lessee) by *Crookshank*, 24 feet; thence easterly, along the S. side of the same lot, to the S. E. corner thereof; thence S. to the N. E. corner of the barn now in the occupation of *Robert M. Murray, junior*, and standing on the land of *Blanchard*, (the lessor); thence westerly, along the N. side of the said barn, to the north corner thereof; thence southerly, to the said lot formerly of the said *Hawley*; thence westerly, along the N. side of the same lot, to the place of beginning, part of the dwelling house of the said *Allen*, (the lessee) standing on part of the west end of said lot hereby granted—*Excepting and reserving* in and out of the said

To make a receipt for rent operate as a waiver of a forfeiture of the estate demised, the rent must not only be received after the forfeiture is incurred, but such rent so received must have accrued after that time.

And this validates the lease only to the time when the rent so received accrued; but will not operate as a waiver of a forfeiture incurred by continuing the original cause of the forfeiture after the day on which the rent received fell due.

UTICA,
Aug. 1824.

Jackson
v.
Allen.

granted lot, &c. to the said *Blanchard*, his heirs and assigns, a right of way, as well a foot way as a horseway, and a way for his and their carts, carriages and servants, in, out and through the granted lot, at all times;" and reserving a yearly rent of \$15, payable the 30th December, in every year, forever, &c. with the usual clause of distress and re-entry, if the rent should be in arrear for 20 days. Then came this clause: "And these presents are upon this condition; that the said *Allen*, his heirs, &c. shall and do at all times, forever hereafter, permit and suffer the said *Blanchard*, his heirs, &c. to have, use and enjoy the right of way above mentioned, without any obstruction or let whatsoever; but nothing herein contained shall extend to prevent the said *Allen*, his heirs, &c. erecting a gate or gates on the west part of said granted lot, subject to be opened by the said *Blanchard*, his heirs, &c. at their discretion." Then followed the usual covenant for quiet enjoyment, be, the lessee, fulfilling the covenants on his part, &c.

The lessor then admitted, that in September, 1820, the defendant paid the rent which fell due on the 30th December, 1819.

Jonathan Morey then testified, that he surveyed the alley; that it was originally 24 feet wide, and extended from the road to the lessor's land on the east; that about 12 feet of the south end of the defendant's brick house stands on the alley; that the defendant has enclosed in his garden, by a permanent fence, all the alley, except a strip $9\frac{1}{2}$ feet wide, on the north side of the alley, and the part so enclosed is occupied by the defendant, as a garden; that there is a gate near the west end of the alley, on the south side of the defendant's house. On the south side, the alley is $181\frac{1}{2}$ feet long. *Joseph Cooper* testified, that the garden fence now stands where it did in April, 1820. *Thaddeus Smith* testified, that a part of the alley was enclosed, and occupied as a garden, in 1807, and so continued to the present time; that the part of the alley left open is of sufficient width to allow a waggon or carriage to pass with safety, but not wide enough for two waggons to pass each other, if they should meet. *Archibald M'Athelie* testified, that in the autumn of 1819,

the refuse of the alley was piled up at the east end of it, with the manure which was thrown from the shed adjoining the alley. This manure continued there till the spring of 1820, when it was drawn away by the defendant. That part of the alley next to and adjoining the defendant's barn, was usually occupied by the defendant's cows in the winter, and his cows were generally fed there. In one instance there had been wood thrown into the alley by the defendant, but it did not obstruct the passage to the back part of the alley, and it was soon cut up and piled away. *George Coggswell* testified, that in *April*, 1820, he was sent by the lessor to ask the defendant to remove the manure which was there piled up at the east end of the alley; that there was a rack standing on the manure, from which the cattle ate their fodder; that the rack was lengthwise the alley. The defendant said the manure was so frozen he could not then remove it. The lessor's barn stands on the south side, and at the east end of the alley, where a gate opens to the lessor's land. The door of the lessor's barn opens on the north side of his barn, into the alley; the rack stood within about 4 feet of the door of the lessor's barn; and the manure was piled up two or three feet high against the lessor's barn door, so that the witness could not open it during the month of *April*, 1820. At another time, this witness went with a team of horses to go through the alley, when the defendant told him he could not get through, which he found to be true, the rack being frozen down on a pile of manure; and if the rack had been removed, it would have been impossible to have driven a loaded cart or waggon over the manure, without upsetting; that the alley, at the east end, is only about 12 feet wide. *Lyman Gleason* testified, that in the latter part of *April*, 1820, he was employed by the defendant to clear out the manure and filth from the alley; that cattle appeared to have been fed there, the manure being scattered pretty much over that part of the alley which was occupied as a pass way to the rear of the lot. There was also a pile of manure near the gate, at the east end of the alley, over which they passed with the waggons when drawing the manure. The rack which stood upon it was removed, by one man's taking hold

UTICA,
Aug. 1824.
Jackson
v.
Allen.

UTICA,
Aug. 1824.

Jackson
v.
Allen.

of one end of it, and one other hold of the other end, and setting it against the side of the barn, out of the way. The pile of manure was about in the centre of the alley, but did not extend south to the barn of the lessor; that the snow had drifted against the barn door, which prevented its opening, but the manure formed no impediment, and was not within 8 feet of the door. The witness scraped up the manure, and found that it did not extend either to the gate or the barn upon the south. The manure from the defendant's stable was thrown into the garden, and not into the alley. The pile appeared to have been scraped up the fall before, from what had accumulated in the alley the previous summer, *John Smart* testified, that he assisted *Gleason* in removing the manure, but did not come till the 2d day. He could not drive a loaded waggon over the manure, through the alley, into the lessor's lot, but thinks an empty waggon might have been driven over it. When he drove in his waggon to get out the manure, he was obliged to take his horses from the waggon, and turn it round by hand. *Isaac Powers* testified, that he saw the pile of manure, drove his waggon with a load of hay to the defendant's barn, and unloaded it, but could not turn round in the alley. He opened the gate at the east end, drove through on to the lessor's land, turned round, and then drove his waggon empty back through the alley. A loaded waggon could not have been driven over it with safety. *Russell Bassett* testified, that he saw the pile of manure, about half way between the defendant's barn and the lessor's. He went in with a load of hay, and drove round the pile of manure with ease. He saw the rack, and thinks it formed no obstruction. Thinks there might have been 3 or 4 loads of manure in the pile.

The defendant then moved for a nonsuit—

1. Because, if there was any obstruction, the lessor's only remedy was by a personal action. The lease was not forfeited.

2. That if the defendant left unobstructed a straight way from one end of the alley to the other, of the same width as that part which adjoined to, and was not covered by the house, it was all the lessor had a right to claim.

3. That the defendant had a right to enclose and cultivate all the alley, except a convenient and sufficient way over it for the lessor's use.

4. That the obstruction formed by the house and fence, including a part of the alley in the garden, being upon the alley at the time the lease was given, was to be received as evidence of the acquiescence and consent of the lessor to their continuance, and that for them no forfeiture could exist.

5. That the obstruction having existed previous to the rent's becoming due, in 1819, the lessor's receiving that rent was a waiver of the forfeiture, if any had accrued.

The Judge decided, that an obstruction of the lessor's right of way over any part of the demised premises, would be a forfeiture of the estate ; that this was a question of law, which, however, depended upon the fact of such obstruction ; and he charged the jury, that if they believed, from the testimony, that a part of the alley, as described by the witnesses, was, between the 30th December, 1819, and the 3d of May, 1820, enclosed by a fence in the defendant's garden, and appropriated to his exclusive use, and the obstruction in the remaining part of the alley rendered the passage, with loaded teams, unsafe and hazardous, the plaintiff would be entitled to recover on the ground of forfeiture ; but that the house, having been mentioned in the lease as standing on the premises, could not constitute an obstruction, within the terms of the lease. The recognition of this fact by the lease, clearly shewed that it was not so considered at the time the lease was executed. The jury gave a verdict for the plaintiff for the alley.

S. Stevens, for the defendant, now moved for a new trial, on the grounds taken at the Circuit.

He added, in relation to the first point, that the words of the lease, " these presents are upon this condition, &c." did not import a forfeiture for the obstruction. To have this effect, the words should be express and explicit ; but the lease contains no plain words of forfeiture, except for the non payment of rent. The plaintiff had a complete rem-

UTICA,
Aug. 1824.

Jackson
v.
Allen.

UTICA,
Aug. 1824.
Jackson
v.
Allen;

edy by a personal action against the lessee or his assigns. The words which are claimed to warrant a forfeiture are, at least, of doubtful import; and the Court will lean against a harsh construction. Courts always lean against the forfeiture of leases. In *Jackson v. Brownson*, (7 *John. Rep.* 235) *Spencer, J.* says, "It is an established principle, that in construing a covenant which is to work a forfeiture, Courts adhere strictly to the precise words of the condition. This rule, for its equity and reasonableness, deserves constantly to be kept in view. It is, in most cases, rigorous and harsh, to break up a lease, for the violation of covenants which may be compensated in damages; and the present case appears to be one of that description." In that case, the lessee had agreed, expressly, that if the covenants in the lease should be violated, it should operate as a forfeiture.

As to the other points, he remarked, that *Allen* had done no act to work a forfeiture. When he took the lease, at this rent, he certainly had a right to expect some benefit from it, beyond a mere right of way. No casualty should be allowed to work a forfeiture. Some affirmative act should be shown, tending directly to deprive *Blanchard* of a right of way. The condition should be violated in its precise language, before the law will allow the act to operate as a forfeiture. (*Jackson v. Brownson*, 7 *John. Rep.* 227, 232, 235. *Jackson v. Harrison*, 17 *id.* 66, 70, 71. *Woodf. L. & T.* 203. *Bull. N. P.* 96.)

Here was a waiver of the forfeiture, by receiving rent. (*Woodf. L. & T.* 519. *Comp.* 247. *Roe v. Harrison*, 2 *T. R.* 425. *Doe v. Bancks*, 4 *B. & A.* 401.) The last was a strong case to this point. It may be objected, that the receipt here was of rent due before the forfeiture; but this is true as to only a part of it.

J. Willard & J. Crary, contra. The lease having mentioned the fact that part of the alley was covered by the house, we did not insist on a forfeiture for that reason; but a part was also enclosed by the defendant for the purposes of a garden. This we do insist on as a forfeiture; and the very circumstance that the lease provides for the house and gate, implies that no other obstruction was admissible. All

others are excluded by this provision. The argument that the garden fence may be continued, because it was there when the lease was given, proves too much. It might as well be said that had all the premises been permanently enclosed at that time, therefore, no way whatever should be allowed to the lessor. The reservation of the way is in strong technical terms, and clearly manifests an intention to reserve all not covered by the house. But suppose its extent was, in some measure, at the discretion of the defendant; here has been a total obstruction. If the testimony was contradictory, it was fairly submitted to the jury, who have found the obstruction.

A clause of re-entry was not necessary to provide for the forfeiture. The lease rested expressly upon the condition that there should be no obstruction; and the condition is well expressed. (2 *Cruis. Dig.* 1, 2. *Co Litt.* 201, a. *id.* 203, a.) It is a reasonable condition. The remedy for condition broken is by ejectment. Even an actual entry is not necessary. The confession of lease, entry and ouster, by the consent rule, is enough. (2 *Cruise Dig.* 49. *Adams' Ejectment*, Am. ed. 90. *Jackson v. Cryslar*, 1 *John. Cas.* 125. *Langendyck et ux. v. Burhans*, 11 *John.* 461.)

The acceptance of rent was no waiver of the forfeiture. We received no rent which fell due after the 30th December, 1819. Our act supposed the lease good to that time, and has no further effect. The acts of forfeiture complained of were all subsequent. We were restrained in our evidence to the time which intervened between that day and the 3d of May, 1820, when the ouster was laid in the declaration: Though the receipt of rent may operate as a confirmation of the estate, it does not discharge the condition. The lessee had the estate free of the forfeiture to the time up to which we received the rent; not after.

The argument that we should have taken our remedy by personal action, we presume, means that we should have brought covenant or case. But there is no covenant against the obstruction. It is guarded against by condition only: and conceding that we might bring case, the same circumstances, which would warrant this action, will authorize an

UTICA,
Aug. 1824.

Jackson
v.
Allen.

UTICA,
Aug. 1824.

Jackson
v.
Allen.

ejectment for the forfeiture. The whole extent of this alley is less than the statute would allow for a private way ; yet, after being narrowed to 9 feet by permanent erections, it is totally obstructed by the filth, manure and rack. Only one witness says he could pass around it ; and he mentions no time when this was done. All the other witnesses concur in saying there was a total obstruction.

D. Russell, in reply. I ask again, was it intended by the parties that *Blanchard* should enjoy a way over this whole alley, and yet receive the 15 dollars' rent ? The testimony shews abundantly that the way left was enough for all ordinary use ; and the occupation and acts of the lessor, before the lease was executed, defined the extent which was necessary. The way has not been altered since the lease. It is now as broad as the lessor himself made it when he had the whole control. The house was then built, and the fence made. Here is a covenant on the part of the lessor, that on the defendant's fulfilling the covenants on his part, he shall enjoy the premises. It is said here is no covenant against obstruction. Be it so. There is then a fulfilment of all our covenants, and, in the very terms of the lease, can be no forfeiture. The lessor can have a remedy by an action on the case alone.

The Judge did not, as supposed on the other side, put the case fairly to the jury. It was decided by him that any, the least obstruction, would be a forfeiture, and taking this for the rule, the verdict was inevitable.

But, in reality, there was no obstruction ; nothing to prejudice the lessor. The whole was temporary and casual ; and on being apprized of the lessor's wishes to that effect, every effort was promptly made to remove it ; and it was removed before suit commenced. The reasoning of the Judges in *Senhouse v. Christian*, (1 T. R. 560) will be found in point upon the question of obstruction.

For the effect of an acceptance of rent, the Court are referred to what *Ld. Mansfield* says in *Jenkins v. Church*, (Comp. 482 ;) and *Goodright v. Davids*, (id. 803.) Also, to what was said in *Fox v. Swann*, (*Styles*, 482-3.)

The receipt was of rent accrued after the pretended forfeiture, viz. of rent due 30th December, 1819; whereas the obstruction was in piling refuse, &c. the fall before.

WTICA,
Aug. 1824.

Jackson
v.
Allen.

Curia, per SUTHERLAND, J. I think the Judge erred in charging the jury, that if they believed a part of the alley, as described in the lease, was, between the 30th of December, 1819, and the 3d of May, 1820, inclosed by a fence, in the defendant's garden and appropriated to his exclusive use, and the obstruction in the remaining part of the alley rendered the passage with loaded teams unsafe and hazardous, the plaintiff would be entitled to recover on the ground of forfeiture. These two causes of forfeiture should have been separately and distinctly presented to the jury.

The exceptions and condition in the lease did not bind the defendant to leave the whole of the demised premises unoccupied and unimproved; unless the whole was necessary for a convenient way or passage for the horses, carriages, carts, and servants of the lessor. Suppose the premises conveyed had been one hundred, instead of four and twenty feet in width; would it be contended, that the reservation of a right of way extended to each and every part of them, and prohibited the defendant from inclosing any portion? It should have been submitted to the jury, as a matter of fact, whether enough of the alley was left unenclosed to afford a convenient passage for the lessor, and if they were of opinion that there was, then, clearly, the plaintiff would not be entitled to recover on that ground. If the construction contended for by the plaintiff's counsel be correct, the effect of the conveyance was merely to give to the defendant a right of way through the alley; for if he could not enclose any portion of it, he could not use it permanently in any other way, without encroaching on the lessor's rights. Now if this had been the understanding and intention of the parties, they would most naturally have carried it directly into effect, by a simple conveyance of a right of way to the defendant.

But again: the fence complained of was on the premises at the time of giving the lease, and had been there several

UTICA,
Aug 1824.

Jackson
v.
Allen.

years before. It took no more in width from the alley than was covered by the defendant's house. These are strong circumstances which a jury would be authorized, and, I think, bound to consider equivalent to an admission on the part of the lessor, that neither the house nor the fence encroached upon the right of way intended to be reserved by him. But, at all events, the question of fact should have been submitted to the jury.

As to the obstruction *occasioned by the manure*, the evidence was contradictory. It appears to have been about the center of the alley. *Bassett* testified, "that he took a load of hay to the defendant's barn, and drove round the pile of manure with ease; and thinks that it formed no obstruction;" that there might have been three or four loads of it. *Powers* also drove a load of hay to the defendant's barn, and he thought a loaded waggon could not have been driven over the manure with safety; but he does not say, that there was not room to pass round it, and from the diagram it would appear that he must have gone round it with his load, in order to get at the defendant's barn. Other witnesses stated that loaded teams could not be driven over the manure with safety; but there is not one who swears that after the rack was removed, a loaded waggon could not have passed round the manure without danger or inconvenience. The jury might well have come to the conclusion, that the manure did not so obstruct the alley as to deprive the lessor of a convenient passage through it.

If the obstruction did amount to a forfeiture, the receipt of rent by the lessor in *September*, 1820, was not a waiver of it. The manure was not removed, until the last of *April*, 1820. The rent which was received, fell due in *December*, 1819. In order to render the receipt of rent a waiver, it is necessary that the rent should have accrued as well as have been received subsequent to the forfeiture. It proceeds upon the principle that the lessor, by receiving the rent, affirms the lease to have continuance, as *Ld. Coke* expresses it; but that can only relate to the time when the rent fell due, and not to the time of its payment; and so are all the authorities. (*Co. Litt.* 211, b. *Woodf. L. & T.* 203-4. *Doe*

v. Batten, *Comp.* 246, *Aston, J. Jenkins v. Church*, *id.* 482. *Goodright v. Davids*, *id.* 803. *Roe v. Harrison*, 2 *T. R.* 425. 1 *Saund.* 287 *c. n.*(16). *Pennant's case*, 3 *Rep.* 64.) The receipt of rent was an affirmance of the lease on the 30th of December, 1819; but the obstruction still continuing, the subsequent forfeiture has not been waived. The case of *Doe v. Bliss*, (4 *Taunt.* 735) is precisely analagous on this point; and the same doctrine is fully sustained by the subsequent case of *Doe v. Bancks*, (4 *B. & A.* 401.) The lease was not absolutely void, but voidable at the option of the lessor upon a breach of the condition. (*Doe v. Bancks*, 4 *B. & A.* 401.) If the lessor, therefore, with a full knowledge of the forfeiture, had accepted rent, which fell due after that event, the cases already cited show that it would have been a waiver.

UTICA,
Aug. 1824.

Goodrich
v.
Woolcott

The lessee had but an estate upon condition, on breach of which, the lessor undoubtedly had a right to re-enter. (*Co. Litt.* 203, *a. et seq. sections* 328-9-30-31.)

But a new trial must be granted, for the misdirection of the Judge, the costs to abide the event.

New trial granted.

GOODRICH against WOOLCOTT.

MOTION in arrest of judgment, for the insufficiency of the declaration. This contained 4 counts, in slander, upon which a general verdict had been found for the plaintiff; and the motion was founded upon the insufficiency of the last count only, the goodness of the others being conceded by the counsel for the defendant. The declaration contained a general recital, that "the said Charles (the defendant)

A count in slander, charging that the defendant uttered and published these words: "He" (meaning the said I. the plaintiff) "has been with a sow; and I (mean-

ing the said C. the defendant,) can prove it," preceded and followed by a recital and averment, that the words were intended to charge the plaintiff with the crime against nature, &c. held sufficient.

Where words are of doubtful import, the jury are to find their meaning.

The office of an *intendo* is merely explanatory. It cannot enlarge the meaning of words beyond their natural signification.

UTICA,
Aug. 1824.

Goodrich

v.
Woolcott.

contriving and wickedly and maliciously intending to injure the said *Issachar* (the plaintiff) in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and among all his neighbors, and other good and worthy citizens of this state, and to cause it to be suspected and believed that he, the said *Issachar*, was a person of unnatural passions and appetites, and was guilty of the abominable and detestable crime against nature; and to cause him to be abhorred and shunned as a person unfit for, and unworthy of all society; and to subject him to the pains and penalties by the laws of this state made and provided, and inflicted upon persons guilty thereof; and to vex, harass, oppress, impoverish, and wholly ruin the said *Issachar*, on, &c. at, &c." spoke the words in the 1st count. The 4th count was as follows: "That on, &c. at, &c. the said *Charles*, farther contriving, and intending as aforesaid, in a certain other discourse, which he, the said *Charles* then and there had, of and concerning the said *Issachar*, in the presence and hearing of divers other good and worthy citizens of the state aforesaid, then and there, in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said *Issachar*, these other false, scandalous, malicious and defamatory words, following, that is to say; *He* (meaning the said *Issachar*) *has been with a sow*; and *I* (meaning the said *Charles*) *can prove it.*" And the said *Issachar*, in fact, saith, that the words last aforesaid were so uttered and published by the said *Charles*, with intent and meaning to convey, and that the same were by the said last mentioned citizens, in whose presence they were so uttered and published, understood and believed to convey a charge against the said *Issachar*, that he was a person of unnatural passions and appetites, and capable of committing, and had committed the detestable and abominable crime against nature, and that he the said *Charles* could prove it; and was thereby rendered infamous and unfit for, and unworthy of all society; and was subject to the pains and penalties by the laws of this state made and provided and inflicted upon persons guilty thereof. By means, &c."

Z. A. Leland for the defendant. It is well settled, that an *inuendo* does not enlarge the sense of the words : and we have, therefore, a right to consider the words charged to have been spoken, entirely independent of any averment in this count as to their meaning.

[The counsel was about to cite authorities to this point, but the *Court* told him it was too plain to require any reference to authorities.]

UTICA,
Aug. 1824.
Goodrich
v.
Woolcott.

Leland. The modern doctrine is well established, that the words charged must, of themselves, clearly convey the idea of a crime ; and, indeed, neither the ancient nor modern cases will support this count. In *Miller v. Buckdon*,^{(a) 2 Bulst. 10.} the defendant and another, having some speech about the death of a child of one *Dowland*, the defendant said that the plaintiff was the cause of the death of the child, and that he (the defendant) would swear it upon a book. On verdict for the plaintiff, a motion was made in arrest ; and the Court held the words not actionable for want of a colloquium, pointing them to a case of poisoning, murdering or some other untimely death. Without this, they were pronounced too general ; that the plaintiff *caused* the death, was not enough ; and the Court put a case by way of illustration, that one may be the cause of another's death, and yet be perfectly innocent ; as where it is caused by lawful imprisonment. In *Harrison v. King*,^{(b) 7 Taunt. 431.} on error to the exchequer chamber, the words in one count were, " I will take him to *Bow-street* on a charge of forgery ;" *inuendo*, that the plaintiff had been guilty of forgery. On verdict and judgment for the plaintiff, generally, upon all the counts, the error assigned was, " that the words did not import any express or precise imputation of the plaintiff below having committed forgery ; but only an intention of the defendant below to take the plaintiff to *Bow-street* (without shewing where, in that street, or for what purpose, upon a charge of forgery, without stating by or against whom made, or of what forgery,) and which words of themselves constituted no cause of action, although they were laid in a separate count, as a separate cause of action, without any special damage." And for these causes, the judgment was reversed.

UTICA,
Aug. 1824.
Goodrich
v.
Woolcott.

(c) *Coup.*
275.

(d) *Rep.*
Temp. Hardw.
325.

(e) 9 *East*,
274.

(f) *Onslow*
v. Horne, 3
Wills. 177.

(g) *Harri-*
son v. Strat-
ton, 4 *Esp.*
Rep. 218.

(h) *Holt v.*
Scholfield, 6 *T.*
R. 690. *Hop-*
kins v. Bea-
dle, 1 *Caines'*
Rep. 347.

(i) 6 *T. R.*
694.

Peake v. Oldham (c) will probably be relied on for the plaintiff; and is undoubtedly the strongest case against us. There the defendant told the plaintiff he was *guilty* of the death of a person. This was charged in the 4th count; the others being sufficient. *Ld. Mansfield* lays much stress upon the word *guil'ty*, which is wanting here, as showing from the whole frame of the words, that they imported a charge of murder. Upon the same principle, in *Carpenter v. Tarrant*. (d) these words were holden actionable: "*Robert Carpenter* was in *Winchester* gaol, and tried for his life, and would have been hanged, had it not been for *Leggat*, for breaking open the granary of farmer A, and stealing his bacon." So in *Roberts v. Camden*, (e) "He was under a charge of prosecution for perjury, and *G. W.* an attorney, had the Attorney General's directions to prosecute him for perjury," were holden actionable. *Lord Ellenborough* says, "the words must mean that he was ordered by the Attorney General to be prosecuted, either for a perjury which he had committed, or which he had not committed; or which he was supposed only to have committed. In the first sense, they are clearly actionable. In the second, they cannot possibly be understood consistently with the context. He concludes upon the whole matter, that these words must fairly be understood in the first of the three senses, and refers to *Carpenter v. Tarrant*. The words should convey a charge directly; not merely by way of inference. (f) They should not be doubtful or equivocal. (g) Within this rule, saying of the plaintiff he is forsworn, is not slanderous, unless it be said of some judicial proceeding in which he had been sworn. (h) The rule, as laid down by *Ld. Kenyon*, is, that "either the words themselves must be such as can only be understood in a criminal sense, or it must be shewn by a colloquium in the introductory part, that they have that meaning, otherwise they are not actionable." (i) "You swore to a lie, for which you stand indicted," were holden actionable by this Court, on the ground that the concluding words, "*you stand indicted*," imply that the false oath could have been none other than

perjury ; otherwise an indictment would not lie.(j) Independent of such an explanation, most clearly the words would not have been actionable.(k) *Brooker v. Coffin*,(l) was strikingly analagous to the present case. The frame of the words imported perjury, much more directly than those in the present case import the crime against nature or any other crime ; yet they were holden not actionable.

Suppose it asserted of a man that he was with a woman, would it imply an illicit connexion ? A charge of *hooking*, or of being a *cow-boy*, have been holden not actionable. There should be a fixed legal sense to words, by which their quality can be certainly determined. General understanding would pronounce a charge of swearing false to import perjury ; yet, in themselves, these words are clearly not so. It is, therefore, no argument for sustaining this count, that by-standers may have understood the words charged to import the crime of bestiality.

S. M. Hopkins, contra. Is it true, that, in order to maintain an action of slander, the crime imputed must be charged in legal terms ? Is it true, that the slanderer shall escape, if he evades the use of technical or legal terms, although he utter those which all mankind understand to import an abominable crime ? Take the words "hooking," or "cow-bow," put by the gentleman ; is there no way in which a pleader may so frame a declaration as to reach the real intent of the speaker, and make them a slander upon record ? How the declaration should be drawn, in such cases, I do not undertake to say ; but it would be a libel upon the law, and a still greater one upon counsel, to say that it could not be done. Take the case put, of "being with a woman ;" might not such a charge be preceded or followed by such explanations, as to make it convey a charge of adultery ? The law says that a man may be libelled by paintings or pictures ; and yet is there no mode of declaring by which he can reach the offence ? Certainly he may do this, no matter how equivocal the slander.

As to cases ; we rely principally upon *Peake v. Oldham*, already cited from *Comper*, and two cases in *East*, *Woolnoth*

UTICA,
Aug, 1824.

Goodrich
v.
Woolcott.

(j) *Pelton*
v. *Ward*, 3
Caines' Rep.
73.

(k) *Ward v.*
Clark, 2 *Johns*
Rep. 10. *Staf-*
ford v. Green,
1 *id.* 505.
(l) 5 *id.* 189.

UTICA;
Aug. 1824.

Goodrich

v.
Woolcott.

(m) 5 East,
463.

(n) 9 id. 93.

(o) Corp.
211, per Ld.
Mansfield.

(p) 1 R. L.
408, i. 3.

v. *Meadows*; (m) and *Roberts v. Camden*, (n) the latter also cited on the other side. *Woolnoth v. Meadows* will be found a precedent for most of the count in question. The same introductory matter, and the same concluding averments and inuendos, almost word for word, will be found there; and the words charged were certainly not more definite than here, in fixing the crime. They were these: "His character is infamous. He would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him, and hunt him from all society. If his name is enrolled in the royal academy, I will cause it to be erased, and will not leave a stone unturned, to publish his shame and infamy; delicacy forbids me from bringing a direct charge; but it was a male child of nine years old, who complained to me." Such words, accompanied with our averments, were held actionable. This is after verdict. The jury have passed upon the case; and where words are equivocal, it is the province of the jury to determine their import. (o) They have declared that the words intended to convey the imputation averred. If it be said that the declaration here varies from that in *Woolnoth v. Meadows*, in not naming the crime, we answer, that it is enough to follow the statute, which also forbears to name it; (p) whereas the statute of *Henry 8*, does give the crime a name. This accounts for its being named by the English pleader. That it was not named in this instance, arose from a delicate and accurate distinction between the English act and ours; and the Court will the more readily countenance this general form to avoid offensiveness.

In the language of Ld. *Mansfield*, then, in *Peake v. Oldham*, will the Court, after the jury have found the fact, "be guessing and inventing a mode in which it may be barely possible for these words to be spoken by the defendant, without meaning to charge a crime?" That case is full to our purpose. "The jury," says he, "have found the fact, namely, that such was the meaning of the defendant." And he also cites and comments upon the manu-

script case of *Ward v. Reynolds*, which is still more strongly in point. The defendant said to the plaintiff, "I know you very well; how did your husband die?" The plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On not guilty, there was a verdict for the plaintiff; and on motion in arrest of judgment, the Court held the words actionable; because, *from the whole frame of them, they were spoken by way of imputation.*" And *Ld. Ch. Justice Parker* said, "It is very odd that, after verdict, a Court of Justice should be trying whether there may not be a possible case, in which words spoken by way of scandal, might not be innocently said. Whereas, if that were, in truth, the case, the defendant might have justified, or the verdict would have been otherwise." After citing that case, *Ld. Mansfield* remarks, "So here, if found to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction, &c." *Poturite v. Barrel*,^(q) was not stronger against the defendant than the present; and *Comyn*, (in his *Digest*, action upon the case for Defamation, (E.) &c.) refers to scores of cases, which are less so, and yet the action was held to lie. But *Peake v. Oldham*, is a sufficient authority, and cannot be shaken. That case begun in the Common Pleas, where the questions first came up on a motion in arrest, which was denied; ^(r) whence it was carried to the King's Bench; and the report in *Cowper* is on error. It was a case strongly litigated, and underwent very great examination by the ablest Judges.

Roberts v. Cambden,^(s) is our last case. There the charge was, that the plaintiff was under a prosecution for perjury. Now this may be consistent with the plaintiff's perfect innocence; yet the Court were unanimous that the action lay. ^{(s) 9 East, 93.}

Leland, in reply. The case of *Woolnorth v. Meadows*, bears no analogy to the one under consideration. The words there alleged to have been spoken, conveyed a clear charge

UTICA,
Aug. 1824.
Goodrich
v.
Woolcott.

(q) *Sid.* 220.

(r) *W. Bl*
Rep. 959.

UTICA,
Aug. 1824.

Goodrich
v.
Woolcott.

of the crime to the understanding of every body. Taking the whole together, there was no room to suppose any other intent than to charge the plaintiff directly with a crime. It is evident, that nothing could have been made, out of the words in *Peake v. Oldham*, had it not been for the word *guilty*, used by the defendant, which was the only word the Court could find to support the record. As *Ld. Mansfield* objects, after verdict, to guessing out innocence, may we not, at least, with equal propriety, respond by asking, will the Court set themselves about guessing or hunting out guilt? What is called an averment in this case, and is relied on to help the defect in the naked words, is no more than a mere *inuendo*, and if not warranted by the words, it goes for nothing. This is now the settled doctrine, and was applied by *Spencer, J.* in *Brooker v. Coffin*.⁽¹⁾ to a case in principle precisely like the present. He says the averment is not warranted by the words. So here, there must be premises to warrant the *inuendo*, which is no more than a necessary conclusion, following the words themselves. This is not the case of a colloquium about the offence set forth in the declaration, and the words applied to it. That would have been a different thing. The apology is, that the words are offensive. Had counsel thought of this when pleading, it was easy to have helped it by a colloquium, which should have been as modest as the *inuendo*.

(1) 5 John.
Rep. 192.

There is no ambiguity in this case to be helped by a verdict. The full force of the expression comes out in the declaration; and must be tortured to make out an imputation of guilt. They are simply, "he has been with the animal." This is the whole; and there is nothing on the record, which can be legally called in as controlling the import. In the eye of the law, it is the same as if the recital and *inuendo* were stricken out; and it is hardly possible to conceive that they could impute a crime. Delicacy, either in the statute or counsel, would not forbid his pursuing the words of the act, by alleging that the defendant asserted, in substance, that the plaintiff had committed the crime against nature; and then it would have been for the

Jury to say whether the words proved were tantamount to those complained of by the plaintiff.

UTICA,
Aug. 1824.

Goodrich
v.
Woolcott;

Curia, per SUTHERLAND, J. The three first counts in the declaration are unquestionably good. They contain a clear and explicit charge of the abominable crime against nature, in language which none of the hearers could misunderstand. The only question is as to the fourth count. If that is bad, the judgment must be arrested, the verdict being general.

The words in the fourth count are, ("He," (meaning the said *Issachar*) "has been with a sow, and I," (meaning the said *Charles*) "can prove it." What is the plain and natural import of these words? and what idea are they calculated to convey to the by-standers? Can it admit of a doubt, that ninety-nine persons out of an hundred would understand them as conveying a charge against the plaintiff, of having had a criminal and unnatural connexion with a sow? The enquiry is not whether the words *could* have been understood in any other terms, but whether that is the construction which common persons would naturally put upon them. (*Roberts v. Cambden*, 9 East, 96, per *Ld. Ellenborough, C. J.*)

In *Peake v. Oldham*, (1 Comp. 272-3,) *Ld. Mansfield* says, "where words, from their general import, appear to have been spoken with a view to defame a party, the Court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them." But this count goes on and avers, "that the words last aforesaid were so uttered and published by the said *Charles*, with intent and meaning to convey, and that the same were by the last mentioned citizens, in whose presence they were so uttered and published, understood and believed to convey a charge against the said *Issachar*, that he was a person of unnatural passions and appetites, and capable of committing, and had committed the detestable and abominable crime against nature, and that he, the said *Charles*, could prove it."

UTICA,
Aug. 1824.

Goodrich
v.
Woolcott

If the words were of doubtful signification, it was the province of the jury to determine in what sense they were used. (*Oldham v. Peake*, 2 Bl. Rep. 961-2. *Dexter v. Taber*, 12 John. 260.) In *Woolnoth v. Meadows*. (5 East, 463,) the declaration contained an averment similar to this ; and Lord *Ellenborough*, in his opinion, (page 470.) speaking of the averment, says, " Upon a count so framed, the plaintiff must have gone into other proof than the mere speaking of the words ; and he must have not only shewn that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were so understood by the bearers." So in *Peake v. Oldham*, (*Cowp.* 278,) *Ld. Mansfield* says, " If the words had been shewn to have been innocently spoken, the jury might have found a verdict for the defendant. *But they have put a contrary construction upon the words as laid, and have found that the defendant meant a charge of murder ;* and he quotes, with approbation, the language of Lord Chief Justice *Parker*, who says, " It is very odd, that after a verdict, a Court of Justice should be trying whether there may not be a possible case, in which words spoken by way of scandal, might be innocently said. *Whereas, if that were in truth the case, the defendant might have justified, or the verdict would have been otherwise.*" In this case, therefore, the jury, by their general verdict, have found the words to have been spoken and understood in the sense set forth in the averment. The motion must be denied.

Judgment for the plaintiff.

UTICA,
Aug. 1824.

Jackson
v.
Harris.

JACKSON, *ex. dem.* WORDEN, *against* HARRIS.

EJECTMENT, for part of lot No. 4, in the old township of *Brutus*, in *Cayuga* county; tried at the *Cayuga* Circuit, before (the late) Mr. Justice PLATT, May 27th, 1822.

After the defendant had confessed lease, entry and ouster, at the trial, the plaintiff produced a deed from *Daniel Avery* and *William Satterlee*, commissioners for loaning money of the county of *Cayuga*, to *Allen Worden*, the lessor of the plaintiff, dated September 15th, 1820, expressed to be for the consideration of \$115, to them in hand paid, by *Worden*; and declaring that, pursuant to "an act authorizing the loan of monies to citizens of this state," (a) they granted, bargained, &c. to *Worden*, in fee, "all that certain tract of land, situate in the town of *Cato*, formerly *Brutus*, county of *Cayuga*, and state of *New York*, being a part of lot number 4, in the original township of *Brutus*, beginning, &c." (by metes and bounds) "containing 100 acres of land, being the same land mortgaged to the commissioners for loaning money aforesaid, by *Peter Wolverton*, on the 15th day of July, 1808." The deed was executed by *Daniel Avery* and *William Satterlee*, and witnessed by *Glen Cuyler* and *Jedediah Morgan*.

(a) This is entitled "an act authorizing a loan of monies to the citizens of this state, and was passed April 11, 1808." It will be found at large in the acts (*sess.* 31, *ch.* 216,) printed by *W. & S.* vol. 5, p. 392, amended *sess.* 32, *ch.* 152, *id.* p. 510, *sess.* 38, *ch.* 56, *sess.* 41, *ch.* 38, *sess.* 42, *ch.* 36, *sess.* 44, *ch.* 189, *sess.* 45, *ch.* 249.

An advertisement of mortgaged premises for sale, under the "act authorizing a loan of monies to the citizens of this state," passed April 11, 1808, (*sess.* 31, *ch.* 216, 5 *W. & S.* 392,) is sufficiently particular in its description of the premises, if it contain the name of the mortgagor, the date and number of the mortgage, the number of the lot in which the premises lie, the town in which it was situate when the mortgage was given, and the quantity of acres mortgaged, without describing the premises by metes and bounds.

A proper form of an advertisement

for sale of several lots by commissioners, under the 17th section of that act.

The 17th section, directing the commissioners to put up advertisements of sale at three of the most publick places in the county, is sufficiently complied with, by fixing them in three of the most publick places, though they are all remote from the premises in question.

Whether the commissioners have a right to sell on credit? *Quere.*

But the objection that the commissioners gave a credit for the surplus money, beyond the principal and interest due, can only be made by the mortgagor.

It seems, that it is no objection to the validity of the sale, that the commissioners do not proceed and sell on the first default; but wait till several years interest accumulates.

UTICA,
Aug. 1824.
—
Jackson
v.
Harris.

The plaintiff then read in evidence, a mortgage, for the consideration of \$76, executed by *Wolverton*, to the commissioners, dated the 15th July, 1808, for the premises in question, being the same described in the deed, *habendum*, &c. ; " unto the said commissioners, and their successors and assigns forever, and for the uses and purposes mentioned in an act, &c. entitled " an act, appointing a loan of monies to the citizens of this state ;" providing that if *Wolverton*, &c. should pay, or cause to be paid to the commissioners, the interest of \$76, at 7 per cent. per annum, on the first Tuesday of May, yearly and every year, and should also pay them the principal sum, &c. when the same should by them be demanded, at any time after the 1st Tuesday of May, 1815, then the mortgage to be void, &c.

It was admitted, on the part of the defendant, that he derived title from *Wolverton*, the mortgagor, subsequent to the time when the mortgage was executed.

The plaintiff's counsel then called *William Satterlee*, one of the commissioners, who testified that the interest due on the mortgage remaining unpaid for three years, the commissioners, on the 26th of May, 1820, advertised the mortgaged premises for sale, in pursuance of the statute on that subject, to be sold at the court house, in the county of *Cayuga*, on the 3d Tuesday of September, at 10 o'clock in the forenoon of that day ; and that the same were exposed to sale in conformity with the advertisement. and struck off to the lessor of the plaintiff, who was the highest bidder therefor ; that he immediately paid what was due on the mortgage to the witness ; that some time in October next succeeding the sale, the witness executed a deed to the lessor of the plaintiff, and sent it by one of the witnesses to the deed, to *Daniel Avery*, the other commissioner, for his signature. The plaintiff's counsel then called *Daniel Avery*, the other commissioner, who testified that he received the deed from *Glen Cuyler*, one of the witnesses to it, and executed and returned it to the lessor of the plaintiff by *Cuyler's* hands. He further testified, that no person had caused his name to be entered on the books of the commis-

nioners, as assignee of the mortgagor. The counsel for the plaintiff here rested the cause.

The counsel for the defendant then produced a printed copy of the advertisement of the commissioners of loans, referred to by *William Satterlee*, which was admitted by the plaintiff's counsel, to be a correct copy of the original, and was in the words and figures following, to wit: "Default having been made in the payment of the interest due upon monies secured to be paid to the commissioners for loaning monies for the county of *Cayuga*, on the following pieces or parcels of lands, described in the following list or schedule; and for a more particular description thereof, reference to their several mortgages and minutes will appear:

UTICA,
Aug. 1824.

Jackson
v.
Harris.

Names of Mortgagors.	No. of Mortgage.	Date of Mortgage.	Lying in what town at the date of the mortgage.	On what lot.	No. of acres.	Townships.
<i>Henry Burgess,</i>	9	13th July, 1808.	<i>Sempronius,</i>	No 47	87	
<i>Thomas Lacy,</i>	51	14th July, 1808.	<i>Dryden,</i>	51	150	
<i>James Savage,</i>	57	15th July, 1808.	<i>Lock,</i>	29	100	
<i>Peter Wolberton,</i>	87	15th July, 1808.	<i>Cato,</i>	4	100	<i>Brutus.</i>
<i>Nehemiah Webb,</i>	230	1st May, 1815.	<i>Scipio,</i>	94	25	
<i>W. C. Wilson,</i>	243	1st May, 1815.	<i>Brutus,</i>	29	50	<i>Aurelius.</i>

Now, therefore, in pursuance of the act, entitled "an act, authorizing a loan of monies to the citizens of this state," and its subsequent amendments; notice is hereby given, that on the 3d Tuesday in September next, the said several mortgaged premises will be sold, at ten o'clock in the forenoon of said day, at the court house, in said county, at publick vendue, to the highest bidder. Dated at *Auburn*, this twenty-sixth day of May, 1820.

Daniel Avery, } Commis-
Wm. Satterlee, } sioners."

The defendant's counsel then called *William Satterlee*, one of the commissioners, who testified, that he put an advertisement on the court-house door, at *Auburn*, in *Cayuga* county; one at *Strong's* tavern, in *Owasco*, 8 miles south-

UTICA,
Aug. 1824.

Jackson
v.
Harris.

east of *Auburn* ; one at *Keeler's* tavern, in *Sempromius*, 16 miles south-east of the court-house ; and sent one to *Aurora*, which is 16 miles south-west of the court-house ; and that the premises in question lie 15 miles north of the court house ; that *James B. Clark* tendered him the amount of interest and principal, after the premises were sold to *Worden*, the lessor of the plaintiff, and after he had executed the deed to *Worden* ; that the offer of *Clark* was made sometime in the winter after the sale. The sum of about 15 dollars, being the surplus for which the land sold to *Worden*, over and above what was due on the mortgage, and which was due to *Wolverton*, remained sometime in the hands of *Worden*, after sale ; the commissioners of loans not wishing to receive it until it could be paid to *Wolverton*, who had removed from the state. The defendant's counsel then called *Daniel Avery*, the other commissioner of loans, who testified, that no particular arrangement was made with *Worden*, as to the overplus money going to *Wolverton*, and that there was no condition, that the deed was given to be held by the commissioners until the overplus was paid. He further testified, that he thought he saw the notice of sale posted up in a publick house in *Aurora*. The plaintiff, by consent, took a verdict, subject to the opinion of the Supreme Court on a case to be made.

J. L. Richardson, for the plaintiff, contended, that he derived a perfect title under the deed of the commissioners ; that they acted within their authority, and in conformity with the directions of the statute.

(a) Sess. 31,
ch. 216, s. 11.

The objection will probably be made, that the description of the premises, in the advertisement of sale, was not so full as the act requires. The regularity of the proceedings depends upon the construction of the various sections in relation to this subject. The 11th section(a) fixes the time for paying the interest of the loan annually on the 1st Tuesday of May. By the 15th section, if not paid within 22 days after, the borrower is forever foreclosed ; and the commissioners are to advertise and sell as directed in the 17th section. The provisions of this section have been complied with, in terms, as to time. As to description, they are to

"cause advertisements to be fixed up at not less than three of the most publick places in the county where the premises are situate, describing the quantity and situation of the lands mentioned in the several mortgages foreclosed as aforesaid, and giving notice, &c." They are also to advertise in one of the publick papers of the county. In this case, advertisements were fixed up in 4 or 5 different places, beside being published in the newspaper.

The counsel here read the advertisement ; and insisted that it was a substantial compliance with the act, in point of description. He said the act evidently contemplated a very brief notice ; for section 20, which determines the expense of proceeding, allows but \$3 for all the services and expenses of sale.

The tender of the money by *Clark*, being after the sale, was too late ; besides, he established no right to make the tender. He assumed to be an assignee of the mortgagor, but, by the 20th section, the commissioners were not bound to recognize him in this character, unless he had been recorded as such in their books.

D. Cady, contra, submitted the following points or propositions, in writing :

I. The sale by the loan officers was void, and no title passed to the lessor of the plaintiff.

1. Because the advertisement did not contain a sufficient description of the situation of the land.

2. Because the advertisements were not put up and continued in the proper places.

3. Because the sale was, in part, at least, upon credit, and the deed not executed in the presence of two witnesses.

4. Because the sale was not on the day prescribed by law ; and

5. Because the loan officers had no power, by law, to sell the premises.

II. There having been no regular sale of the premises, and the person under whom the defendant holds having

UTICA,
Aug. 1824.

Jackson
v.
Harris.

UTICA,
Aug. 1824.

Jackson
v.
Harris.

tendered to the loan officers the whole sum due upon the mortgage, he is entitled to retain the possession.

He added, that it is for the Court to say what degree of particularity in the description is required by the statute. There certainly may be a description which is insufficient; and we think the legislature intended it should be enough, at all events, to put the possessor of the land on his guard; as well as to enable those who attend the sale to find the land, acquaint themselves with its value, and be prepared to bid. "Lot.No. 1, in *Brutus*," would enable any one to examine; but an advertisement by the commissioners, that they would sell "one of the lots in *Brutus*," would not enable a purchaser to bid understandingly, without examining every lot in the town. It is matter of publick law, that *Brutus* was divided into lots of 600 acres. Now, the commissioners say, that they will sell 100 acres of a certain lot. Who, from this, could say what part of the 600 acres were to be sold? It may be said, that the name of the mortgagor was mentioned, and that an examination of the commissioners' files would be a guide; but this is not enough. One cannot know through whose hands the land may have passed. Neither *name* nor *record* would, therefore, guide him; and he must examine 600 acres instead of one.

Again: the premises lie 14 or 15 miles north of the court house; yet all the advertisements are fixed up from 8 to 16 miles south of that place.

Fifteen dollars yet remain unpaid by the purchaser. The law is express that money must be paid, on a sale of this description. The commissioners have no power to sell on credit; and they must exact and receive the whole money. If they may give day for the 15 dollars, they may do the same with \$15,000. The rule is, in its nature, inflexible, and cannot accommodate itself to the amount. There is no title in the purchaser, till the money is, in fact, paid to the utmost farthing.

It is conceded that the commissioners acted under a limited authority. Then, we say again, the sale was void, as not being made on the day required by the statute. Previous

to the day of sale, 3 years interest had been suffered to accumulate. By the 18th section, the commissioners are directed to sell on the third *Tuesday of September*, annually, all the lands mortgaged, in respect to which there shall have been a default in not paying the interest ; and by the 19th section, if no purchaser will bid to the principal and interest, they are to enter upon, and lease the lands for the benefit of the state. They are then to offer the land for sale, again, at the next *April* ; and if there is then no purchaser for an adequate sum, the state become seized of the lands, subject to a right of redemption in the mortgagor. Now it is fairly to be presumed, that all these steps were taken. It was the duty of the commissioners to set about them immediately on the mortgagor's default. Whether they did so or not, their powers of sale, in the ordinary way, ceased ; and a tender was made before they had regularly sold. The proceeding was void—it was as no sale—and the tender in season.

It is said, that on default of payment, the commissioners were, by the 15th section, seized of an absolute estate in the lands ; but though this be so, they held it for certain specified purposes. They cannot sit down and dispose of the land in any manner they choose, but must be guided by the statute. (*Denning v. Smith*, 3 *John. Ch. Rep.* 332.)

Richardson, in reply, cited *King v. Stow*, (6 *John. Ch. Rep.* 323) as in point, to shew that any irregularity in the proceedings of the commissioners in relation to fixing up advertisements, or making entries, &c. could not be objected against a *bona fide* purchaser at the sale. The description was sufficient——

[WOODWORTH, J. As far as I remember the practice under this act, the advertisements of sale have always been in the form which was used here.]

Richardson. And the practice is correct in principle. No one could be deceived who lived on *Wolverton's* land. This is a declaration to the possessor, and to purchasers, that *Wolverton's* land, to the extent of 100 acres, would be sold. Nor does it lie in the mouth of the defendant to say,

UTICA,
Aug. 1824.

Jackson
v.
Harris.

UTICA,
Aug. 1824.

Jackson
v.
Harris,

that because the commissioners have indulged him three years, they must, therefore, relinquish the whole amount, This was a matter which lay exclusively between them and the publick. The same answer applies to the objection, that the whole purchase money was not paid. The commissioners had a right to make the purchaser a depositary of the 15 dollars, or any larger amount, if they chose. They have done no more. The money remained with him, waiting a chance to be sent to the mortgagor.

Beside, though the commissioners gave credit for the whole, it is not for the defendant to object. They may assume the whole, and it will operate as a payment, although nothing be, in fact, paid.

Curia, per SUTHERLAND, J. The lessor of the plaintiff claims his title to the premises in question, by virtue of a deed from the commissioners for loaning money in the county of *Cayuga*, under the act "authorizing a loan of moneys to the citizens of this state," passed *April 11th*, 1808. (5 vol. *Laws*, by W. & S. 392.) The premises were mortgaged to the commissioners by one *Peter Wolverton*, on the *15th* day of *July*, 1808; and default having been made by him in the payment of the interest, the commissioners, in pursuance of the directions of the act, sold them at publick auction, and the lessor of the plaintiff became the purchaser. The defendant derives title, also, from *Peter Wolverton*, by a conveyance subsequent to the mortgage; and after the sale to the lessor of the plaintiff, he offered, by the hand of *Clark*, to redeem, by paying the amount due.

The only question in the case is, whether the sale by the commissioners was in conformity to the provisions of the act?

The principal objections are—

1. That the advertisements did not contain a sufficiently minute description of the situation of the land.
2. That they were not put up in the proper places.
3. That the purchase money was not all paid on the day of sale.

There is no pretence of fraud on the part of the commissioners. They are admitted to have acted in good

faith, and the lessor of the plaintiff is a *bona fide* purchaser for a valuable consideration.

1. The 17th section of the act directs, "that the commissioners shall cause advertisements to be fixed up at not less than three of the most publick places of the county where the premises are situate, describing the quantity and situation of the land, &c. and shall also cause such notice to be given in, at least, one of the publick newspapers in the county, if any such there be." The advertisement, in this case, contained the name of the mortgagor—the date and number of the mortgage—the number of the lot—the town in which it was situated, when the mortgage was given—and the quantity of acres mortgaged. It could not have been more particular, without giving a description of the premises by metes and bounds, as contained in the mortgage. The act does not require such particularity. It contemplates only a general description, sufficient to apprise the mortgagor that his land is to be sold, and to enable any persons who may wish to purchase, or who may be interested in the premises by subsequent liens, to locate and identify them.

In *Denning v. Smith*, (3 *John. Ch. Rep.* 332) one of the advertisements neither contained the name of the mortgagor, nor the number of one of the lots; and these omissions were held to be fatal. But the Chancellor seems to admit, that if the name of the mortgagor, and the number of the lot, had been inserted, the advertisement would have been good. He says, the "omission of the mortgagor's name, and of the number of the lot, in the advertisement in *Cattskill*, where the agent of the owner resided, was a most unfortunate circumstance, &c. It was also an omission fatal, in any view, to the legality of the notice." The other notices, the sufficiency of which, in point of form, was not questioned, were not as particular in their description as the advertisement in this case. They described the premises as being in the town of *Cairo*, and as being "lot No. 11, and part of lot No. 14, near *Perce's* mill, containing 125 acres, mortgaged by *Henry Persen*;" without designating what part or portion of the mortgaged premises was in each or either of the lots. The first objection, therefore, is unfounded.

UTICA,
Aug. 1824.

Jackson
V.
Harris.

UTICA,
Aug. 1824

Jackson
v.
Harris.

2. The second objection appears to be founded on the fact that the advertisements were put up in places remote from the mortgaged premises ; for there is nothing in the case to show that the places where they were put up, *were not three of the most publick places in the county.* This is all that the act requires. It is not necessary that one of the advertisements should be upon or near the premises ; and unless *one* of the three most publick places in the county was near the premises, an advertisement there would not be a compliance with the act. In *Denning v. Smith*, the omission to put up an advertisement in *Cairo*, which was in the neighbourhood of the premises, and was one of the most publick and central places in the county, was held by the Chancellor to be a circumstance which, in conjunction with other facts, tended to shew a fraudulent intent on the part of the commissioners. But, in this case, it does not appear that there was any publick place near the mortgaged premises.

In *King v. Slow*, (6 *John. Ch. Rep.* 323) all the advertisements were put up in the village of *Elizabethtown*, twenty miles distant from the mortgaged premises ; and although it appeared that a publick road passed through the premises, and that two publick ferries were maintained within two miles and a half of them, the notices were held to be good ; there being no evidence of a fraudulent intent, and *Elizabethtown* being, in fact, the most publick place in the county. The notices in this case were, therefore, regular.

3. The reason why the surplus, beyond the amount due to the state, was not immediately exacted from the purchaser, is stated by the commissioners to have been, because the mortgagor, to whom it was to be paid, had left the state, and the commissioners did not want the money until they could pay it over. They state expressly, in their testimony, that there was no agreement for a credit. The surplus was only \$15, and there is nothing to show that it was not paid on demand. But this is an objection which, if it can be raised at all, can be urged only by the mortgagor.

Judgment for the plaintiff.

UTICA,
Aug. 1824.

Tompkins
v.
Curtis.

TOMPKINS against CURTIS.

ERROR from the Common Pleas of *Onondaga* county. *Curtis* sued *Tompkins* before a Justice of that county and recovered judgment. *Tompkins* thereupon appealed to the Common Pleas, and *Nathaniel Tompkins*, one of the witnesses before the Justice, became security for the appellant, and signed the bond to prosecute the appeal, &c. On the trial in the Common Pleas, the appellant wishing to have *Nathaniel Tompkins* sworn for him, moved the Court to have him discharged from his bond, which had been duly returned by the Justice and filed with the Clerk, that other security might be substituted; and that *N. T.* might then be sworn as a witness; but the Court overruled the motion, and gave judgment for the appellee; and this point, among several others, came here upon a bill of exceptions.

The court of common pleas, on motion, at the trial, are bound to discharge a surety for the prosecution of an appeal, and substitute other competent security; so that the first may be a witness for the appellant.

G. Lawrence, for the plaintiff in error, cited *Irwin v. Caryell*, (8 John. 407.)

J. R. Lawrence, contra.

Curia, per SUTHERLAND, J. The Court erred in refusing to permit another surety to be substituted. There cannot be a doubt that the person so substituted would be liable upon the bond, so that no possible injury could result from the change. The power of the Court to grant the application is clear. They were fully possessed of the cause. The bond, with the other papers and proceedings, had been returned and filed with the Clerk. The surety was in the nature of bail, whom it is the established practice of the Courts to discharge upon other bail being substituted, when the first is a material witness for his principal. The case cited of *Irwin v. Caryell* is in point. The judgment must be reversed and a venire *de novo*, go from the Common Pleas.

Judgment reversed.

UTICA,
Aug. 1824.

Williams
v.
Matthews.

WILLIAMS against MATTHEWS.

Where a witness is called, and, on objection to his competency, is put on his *voir dire*, and answers generally, that he is interested, he should be rejected. If the party calling him wishes to shew the nature of the interest, as that it is ideal, or such as will not exclude the witness, he should follow up the examination with particular questions.

ERROR from the Court of Common Pleas of the county of Washington. *Williams*, the plaintiff below, declared as endorsee, against *Matthews*, the defendant below, as endorser of a promissory note, made by *Abner & Hugh Harsha*, dated April 9th, 1815, for \$73 with interest from the date, payable to the defendant, or order, on or before the 1st November (then) next. The first count of the declaration set forth a demand of the makers, and notice thereof, and of non-payment, in the usual form, upon the 4th November, 1815. The 2d count averred that before the note fell due, *H. Harsha* absconded, &c. and then set forth the demand upon *A. Harsha*, in the usual form, on the 4th, and notice on the 6th November, 1815. *Plea, non-assumpsit*. On the trial, the plaintiff proved the execution of the note by the makers, and the

One who held a note endorsed in blank, and sold it to another, without endorsing it, is, after the execution of the note is proved, a competent witness for the holder, in an action by him against the endorser.

W. purchased a note of *M.* who endorsed it in blank, before due; *W.* sold it to another before due, who charged the endorser by demand and notice, &c.; and after it was due, *W.* re-purchased it, and sold it to *I.*; held that *I.* might maintain an action on the note against the endorser in his (*I.*'s) own name.

A note is endorsed, and dishonored, and the endorser charged by demand and notice; this is no objection to a further negotiation of the note, and any subsequent holder may sue in his own name, either the maker or the endorser who has been so charged; and the original demand of the maker, and notice to the endorser, enures to the benefit of all subsequent holders.

The only difference between negotiable paper which has been dishonored and that which is not yet due, is, that the former must be taken subject to all the equities existing between those who were parties before the paper became due.

The holder of a note endorsed in blank may fill it up before, or at the trial, with what name he pleases. Other parties to the note (e. g. a prior endorser) have no concern with this question.

Construction of the act (1 R. L. 417,) prohibiting an attorney to buy a chose in action for prosecution. To bring an attorney within the act, there must have been an intent to prosecute.

A count by endorsee against endorser, averring a demand of payment, and notice of non-payment, in the usual form, is satisfied by proving a state of facts which dispenses with actual demand, &c. and shewing due diligence, &c. The facts need not be specially stated in pleading.

A demand of payment, and notice of non-payment should be made and given by the holder of a note or his agent.

Where the 3d day of grace is Saturday, notice of non-payment need not be given till Monday.

endorsement of the defendant's name on the note in blank. He then offered to prove that *A. Harsha*, one of the makers, was an infant at the date of the note, but this being objected to, the Court overruled the evidence. He then called *A. Harsha*, one of the makers of the note, who was sworn on his *voir dire*. He said that he was interested, and objected to testifying. The defendant also objected to his admissibility on the ground of interest. The plaintiff then offered to confine the inquiry to the fact, that a demand of payment was made; but the defendant persisted in his objection, and the Court sustained it; and would not permit the witness to be sworn. The plaintiff then called the Attorney for the plaintiff, who was sworn on his *voir dire*, and said that he bought the note of the defendant before it fell due, and paid him \$73 for it; and that, also before it fell due, he sold, and transferred it to a third person, who is not the plaintiff; that after it fell due, it came again into his hand, and he commenced a suit upon it, in the name of one *Seth White*, against the defendant; that the witness had the sole control of the note at the time the suit was commenced in the name of *White*, and that *White* had nothing to do with it. That suit was discontinued, and in *September, 1817*, the note became the property of the plaintiff, who had no interest in it before that time. The note was then sold to the plaintiff by the witness; that the plaintiff is, and was then an Attorney both in the Common Pleas of *Washington* county and the Supreme Court. The witness was then sworn in chief; and the plaintiff offered to prove by him that the note was endorsed to him, the witness, before it fell due; that, on the 3d day of grace, payment was demanded of *A. Harsha* by him, *H. Harsha*, the other maker, having absconded before the note fell due; and that on the succeeding day, after demand had been made, he, the witness, gave notice to the defendant of the demand and non-payment; and that, before the commencement of this suit, the money was again demanded of the defendant, by the plaintiff's direction. The witness then stated on his examination in chief, that the relation given by him upon his *voir dire* was true; whereupon the defendant's counsel objected to the

UTICA,
Aug. 1824.
Williams
v.
Matthews.

UTICA,
Aug. 1824.
Williams
v.
Matthews.

evidence offered; and the Court sustained the objection, and nonsuited the plaintiff. The plaintiff's counsel excepted to these several decisions of the Court below, and the cause came here upon a bill of exceptions.

I. Williams, for the plaintiff in error. 1. Proof of *A. Harsha's* infancy was improperly rejected. A promissory note made by an infant is void; and demand of payment in such a case is not necessary to charge an indorser. (a) This proof followed, as it was intended to be, by the fact of *H. Harsha's* absconding, would render a demand of payment wholly unnecessary. The declaration is special and warrants this proof.

2. *A. Harsha* was improperly rejected, as a witness. No interest is shewn other than that growing out of his relation to the parties as maker, which left him indifferent between them. (b) If the plaintiff will waive the interest of a witness against him, the latter cannot object on account of his own interest. (c) *Harsha* could have no interest in favor of the plaintiff, nor against himself, in the fact which he was called to prove. (d) The Court should have ascertained that there was an interest; and that it was not merely ideal, before they rejected the witness. If it was mere fancy (as it must have been in this case) he should have been sworn. (e)

3. The Attorney for the plaintiff was competent to prove the facts offered to be shown in evidence by him; and his testimony was improperly overruled. Even an indorser may be admitted as a witness, and that too in behalf of the maker, to impeach the note, by facts arising subsequent to the time of its execution. (f) A payee of a note payable to bearer, or a third person, who has sold and transferred such a note, are not incompetent to shew any other fact beside the execution of the note. He is shut out from this solely on the ground that he has, impliedly, warranted the note to be genuine, not forged. (g) There being no other objection, when the execution of the note is proved, he is competent. But the witness offered in this case was not an endorser; and the objection was not even made to his competency; but related solely to the sufficiency of the matter proposed

(a) *Chit. on*
Bills, 20. 10
John. 33.

(b) & *John*.
428. 15 *id*.
270. 16 *id*. 70.
17 *id*. 176, 188.
(c) *Peak. Ev*.
192, 194.

(d) 2 *Exp. N*.
P. 348. 4
Cranch, 69. 2
Rool, 132. 3
T. R. 35, *per*
Buller, J.

(e) *Peak. Ev*.
164. 8 *John*.
428.

(f) 15 *John*.
240. 10 *id*.
231. *Peak. N*.
P. C. 6. 3
John. Cas. 195,
per Thompson,
J.

(g) 15 *John*.
204. 16 *id*. 201.

to be proved by him. The Court decided that this would not sustain the action. Had the decision related to competency, on the ground of interest, the objection might have been removed by a release. In any point of view, however, interest cannot be objected here ; for, taking the examination upon the *voire dire*, in connexion with the offer of evidence, it is perfectly clear that the witness was not interested.

But the prominent point which the defendant in error probably intends to rely upon is, that the note could not be negotiated after the endorser was charged. In answer to this, we say, there is no legal objection to it, if it in fact remained unpaid to the time of the transfer. (h) An endorser of a note for the accommodation of the maker, and without consideration, that fact being known to the endorser when he took the bill, is, notwithstanding, liable to the endorsee ; and that too even if the endorsee took the bill after it was due. (i) In *Lovell v. Evertson*, (j) the note was endorsed after it became due. In that case, this Court decided that when a note has been endorsed in blank, the owner had a right to fill it up with whose name he pleased ; the defendant having nothing to do with the interest of the plaintiff. This point was also decided in 1800 by the Court of Errors, in *Cooper v. Kerr*. (k) The only objection to the transfer of a note after it becomes due is, that it subjects the holder to all equities in favor of the preceding parties.

Should the objection be made that the endorsement was not filled up in fact, we answer, that the objection was not made in the Court below ; and being merely formal, should not be listened to here.

If it should be said that the plaintiff purchased the note *mala fide*, with intention to sue, we answer, that a party is not to be charged with a crime on mere presumption ; but if otherwise, every presumption is repelled by the fact, that a third person is employed as the attorney to prosecute the suit, the plaintiff deriving no benefit to himself by way of costs ; and the money being demanded before this suit was brought. Again, if he intended to violate the statute, still he has a remedy to recover the note, the transaction being before the act of 1818. Indeed, the act of 1813, which

UTICA,
Aug. 1824.
Williams
v.
Matthews

(h) *Chit. on Bills*, ed. 1809, p. 104. 1 *Show.* 163. 1 *T. R.* 430. *Bayl.* 38, n. d) *Doug.* 633. *Kyd on Bills*, 89. 3 *T. R.* 80. 1 *B. & P.* 398.
(i) 7 *John. Rep.* 361. 3 *Exp. Rep.* 46. 1 *Taunt.* 224.
(j) 11 *John.* 52.

(k) Cited by *Kent, J.* 3 *John. Cas.* 264.

UTICA,
Aug. 1824.

Williams

v.

Matthews,

alone can be objected here, was repealed by the act of 1818. The suit in favour of *White* is not brought to the plaintiff's knowledge.

D. Russell & J. L. Viele, contra. To dispense with a demand upon the maker, when he was accessible, it was not enough to shew that he was an infant. The note was not absolutely void for that reason, but continued good till the infant chose to avoid it. The law regards his interest alone in saying that it is void. As to all the other parties it is good. To shew infancy, was, therefore, no benefit to the plaintiff. An endorsement like this, always creates a mere contingent liability, resting upon the condition, that a demand shall be made of the maker. It does not follow, that he would have availed himself of his infancy, or that he had not ample funds to pay the note.

A. Harsha was not a competent witness. On being asked the question, he answered generally, that he was interested. The Court are blamed for not pursuing the inquiry, and ascertaining whether the interest was fancied or real; but it is the counsel who was to blame. From the general answer, the Court will intend that it was an actual, legal interest, until the contrary is shewn by a particular explanation, which the witness should have been called on by the counsel to make. It does not follow that he could be interested merely as a party to the note. It might have arisen from some other transaction like the interest by which the witness was excluded in *Cowles v. Wilcox*. (1)

(1) 41 Day's
Cas. 108.

The attorney was not a competent witness. In the first place he had transferred the note to the plaintiff; and was responsible to him if it should prove inoperative, or the claim upon it should fail in any way.

But if he was competent, his testimony was not so, to sustain the action. He swears that he transferred the note before it was due; took it up, and then transferred it to the plaintiff after it fell due. To this testimony, an objection was made in gross, and the Court rejected it, for what reason does not appear. Indeed, the bill is so general, in this respect, that it is unavailable to the party. It presents

no single point, and draws in question the whole merits of the case.(m) But suppose all the points now made, to be reached by it, the plaintiff could not recover. In one court, the notice of non-payment is averred to be on the 4th, in the other, the 6th of November, either of which is too late ; and the endorser was discharged.

Again ; after the note had been taken up by Williams, supposing the notice to have been regular, it could not be transferred again. The rights of the endorsee, who fixed the endorser by notice, were personal. To make a demand and notice enure to the benefit of any endorsee, he should hold the note, or his name should appear upon it previous to, or at the time the notice is given. A demand and notice cannot enure to the benefit of any one who is not a party when those steps are taken. The endorser engages that the maker shall honor the note ; but no case goes so far as to make the liability of an endorser negotiable, after the note has been dishonored. The object of making a note negotiable at all, is to improve the facilities of commerce, by the circulation of commercial paper. Is this object to be answered by dishonored paper, the abhorrence of commercial policy ? Under such circumstances, the transfer creates a new contract, unknown to the commercial law, and operative between the immediate parties only, as in the transfer of a chose in action at the common law. The law says, that in all cases, to charge the endorser, the holder or his agent, must make the demand.(n) Here the necessity

and the right of a demand by the plaintiff, had ceased. He did not hold in a commercial character. The right of action as between holder and endorser, depends upon the privity of contract, and this contract is always, that a demand shall be made, and notice of non-payment given by the holder.

Thus, where there are three endorsers, a demand of payment and notice by the second will not enure to the benefit of the third.(o) But a notice from a fifth endorsee to the first endorser, will enure to the benefit of all the intermediate endorsers.(p) Yet, in the latter case, it could avail nothing, if

notice was already given before the endorsement, for it was no longer a benefit to the endorser.

UTICA,
Aug. 1824.

Williams
v.
Matthews.

(m) 2 Caines'
Rep. 168. 5
John. Rep.
467. 8 id.
495. 1 Bac.
Abr. 528.

(n) Kyd on
Bills, 125,
126. Chit. on
Bills, 145, and
cases there ci-
ted.

(o) Kyd on
Bills, 117.
Chit. on Bills,
240, 241.
(p) id. ibid.

UTICA,
Aug. 1824.

Williams
v.
Matthews.

(q) 8 Mass.
Rep. 556.
(r) 9 id. 465.
(s) 1 R. L.
417, s. 7.
(t) 2 Coines'
Rep. 147. 1
Com. on Cont.
30. Cowp.
343. 3 T. R.
23, 454. 5 id.
600. 5 Johns.
Rep. 333.

Again ; this note has been paid and taken up by the endorser. This is plainly inferrible from the case, where we find it coming back into his hands ; and the negotiability of the note was at an end within the cases of *Blake v. Sewall*, (q) and *Boylston v. Green*. (r)

That the note had been purchased by an attorney, was alone a sufficient objection to the recovery ; unless he shows that he bought it in a manner consistent with the act of 1813. (s) No contract can avail, if it be in violation of a publick statute. (t)

Nor does it appear that the notice of non-payment, given in this case, was sufficient. A simple notice that the money had been demanded, and not paid, was not enough. It should not only be given by the holder, or one authorized by him ; but apprise the endorser that he is to be looked to for payment.

Again ; the endorsement was originally in blank, and remained so ; and remains so still. The plaintiff could not recover upon it, until it was filled up. Whoever might hold the note would have the same right to an action as the plaintiff. His name should have been inserted, either at or before the trial. This not being done, his case was not made out, and he was rightly non-suited.

Williams, in reply, said the demand and notice were rightly stated in the declaration. The note being nominally payable on the 1st of *November*, the 3d day of grace was the 4th. But the notice was in truth given on the 6th, because the 3d day of grace was on *Saturday*, a circumstance which entitled the holder to delay notice till *Monday*, which brought the time to the 6th. The second count was drawn with a view to this state of facts.

Curia, per WOODWORTH, J. The plaintiff declared against the defendant as endorser of a promissory note, made by *Abner Harsha*, and *Hugh Harsha*, payable on the 1st *November*, 1815. The first count avers a demand of payment on the 4th *November*, and notice to the endorser. The second count avers, that before the note fell due, *Hugh*

Harsha absconded to places unknown, and afterwards, on the 4th November, payment was demanded of *Abner Harsha*, and notice given to the defendant, on the 6th day of November. At the trial, the plaintiff offered to prove that *Abner Harsha*, at the time of making the note, was an infant, which was overruled. *Abner Harsha* was then offered as a witness, who being sworn on his *voire dire*, testified that he was interested in the event of the suit. The plaintiff proposed to confine the inquiry to the fact of demanding payment; but the testimony was rejected.

William Williams, attorney for the plaintiff, sworn on his *voire dire*, testified, that he bought the note in question of the defendant, and paid \$73; before it fell due, he sold it to a third person, who was not the plaintiff; that after it fell due, it came into his hands again. He commenced a suit in the name of *Seth White*, who had nothing to do with the suit, the witness having the sole control of the note. The suit was discontinued. In September, 1817, the note became the property of the plaintiff, for whom the witness commenced this action. The witness was then sworn in chief. The plaintiff offered to prove, that payment was demanded by him on the third day of grace of *Abner Harsha*; that *Hugh Harsha* had absconded before the note fell due; that on the day after the demand, the witness gave notice of non-payment to the defendant. The witness then stated that the plaintiff first acquired an interest in the note in September, 1817, and that the relation given by him on his *voire dire* was true. The defendant objected to the evidence. The Court sustained the objection, and the plaintiff offering no other testimony, directed him to be non-suited. The plaintiff excepted to the opinion of the Court on all the preceding points.

The Court decided correctly in rejecting the testimony of *Abner Harsha*: whether he had an interest favourable to the plaintiff or defendant, does not appear; and without further explanation, the Court had no means of judging. The plaintiff might have pursued the inquiry, and ascertained the nature of the interest; and if it had then appeared that the interest was merely ideal, or against the party call-

UTICA,
Aug. 1824.

Williams
v.
Matthews.

UTICA,
Aug, 1824.

Williams

v.
Matthews.

ing him, he ought to have been admitted. (8 *John*. 428.) Without doubt, the Court were authorized to require from the witness a statement of the nature of his interest ; but this was discretionary, and does not seem to have been called for. The plaintiff acquiesced in the general answer.

The evidence of *Williams* ought to have been received. He passed the note to the plaintiff on the original indorsement ; but, the execution by the makers being established, it does not appear that he had any interest in favour of the plaintiff's recovery. The evidence to prove a demand on one of the makers, and the absconding of the other, was relevant and material.

But it is urged, by the defendant's counsel, that the note was transferred to the plaintiff after it became due, and after it had been paid by the witness, *Williams*, and taken back by him ; and, therefore, the plaintiff could not recover against the indorser, as upon a promissory note obtained before it became due ; the right acquired by an indorsee, after having charged the indorser, not being transferable. It is a mistake to say that *Williams* had paid the note, and taken it back, whereby it lost its negotiability. The course of the transaction was this : *Williams* sold, and transferred the note to a third person, before it became due. After it became due, it came back to his hands ; which does not imply a payment and taking up the note, but rather that he re-purchased it of the holder. He afterwards sold it to the plaintiff. There is no legal objection to the validity of the transfer of a note after due, provided it remain unpaid, by any of the parties, whether the transfer is made by indorsement or mere delivery. When the indorsee takes a note after due, it is presumed he was acquainted with, or had notice of the circumstances, which would affect the validity of the note, had it been in the hands of the person who was holder at the time it became due, and consequently must stand in the character of the person who was the holder at that time. (*Chitty on Bills*, 141, 142, ed. 1817. 7 *D. & E.* 430. 3 *D. & E.* 80. 1 *Campb.* 383.)

The note being indorsed in blank, the owner had a right to fill it up with what name he pleased : the defendant had

no concern with that question. (11 *John*. 53.) It was competent to fill up the blank on the trial ; but as the Court excluded the testimony, there was no necessity of doing so. A further answer is, that no objection was made on that ground.

UTICA,
Aug. 1824.

Williams
v.
Matthews.

It is also contended, that *Williams*, being an attorney, could not purchase the note, so as to maintain an action upon it, without shewing that his purchase was consistent with the provisions of the act on that subject. The act of *April* 21, 1818, has no connexion with this case, which must be governed by the 7th section of the act, (1 *R. L.* 417.) The former act was passed subsequent to the trial of this cause, and does not affect it. The latter declares, that if an attorney shall purchase a note with intent to commence a suit thereon, and shall commence such suit, he shall be deemed guilty of a misdemeanor. This statute puts the purchase upon the intent. The mere purchase cannot, I apprehend, warrant the conclusion, that it was for the purpose of prosecution. It might equally well have been for other lawful cause. But admitting that the mere purchase of the note was, *prima facie*, sufficient, it was not conclusive as to the intent. Had the cause progressed, and that point been raised afterwards, it would have been competent for the plaintiff to have rebutted the presumption, and shown the fairness of the transaction, and submitted the question of intent to the jury. But the conclusive answer to this objection is, that it cannot now be alleged to support the opinion of the Court below, in rejecting the testimony of *Williams*. The plaintiff was bound to prove a demand and notice. Without this he could not proceed a step. When he offers to prove it, it is premature to say, this evidence will answer no purpose, because the purchase was in violation of the statute. It could not, in that stage of the cause, be known what would be the result of the trial, on that point. It was open to proof, that might be subsequently introduced. It would, therefore, be both absurd and unjust, not to permit the party to make out one part of his case, because, perchance, the plaintiff might not be able to remove another difficulty lying in his way.

UTICA,
Aug. 1824.

Williams
v.
Matthews.

The only remaining inquiry is, whether the proof offered would support the declaration. The first count alleges a demand of payment, and notice to the defendant on the 4th November, 1815. On that day it became due and payable. The general principle is, that the holder must use due diligence; for the indorser is only responsible after a default on the part of the maker. (2 *John. Cas.* 76. 2 *Caines*, 344.) In *Stewart v. Eden*, (2 *Caines*, 127) the declaration was in the common form, stating a demand on the maker, a refusal to pay, and notice to the indorser. It appeared that the makers could not be found at their store; and a demand was made on their clerk. The Court considered the precise question raised here, that is to say, if the maker, when a note falls due, cannot be found, nor payment demanded of him personally, should not the declaration state this fact specially, instead of averring generally, that the note was presented and payment refused? It was held, that evidence of due diligence in the holder to obtain payment, without an actual demand, will support the averment; and under such a count the plaintiff may give evidence of any diligence which is deemed equivalent to an actual presentation of it to the maker. The same principle is recognized in *Saunderson v. Judge*, (2 *H. Bl.* 510) and *Ogden v. Conley*, (2 *John.* 274.)

But if the first count was objectionable, the second is special. It was, that *Hugh Harsha* had absconded; that a demand on the maker was made on the 4th, and notice given to the indorser on the 6th Nov. This was not too late; for the 4th Nov. fell on *Saturday* in that year, so that the next legal day for serving notice was *Monday*, the 6th. (2 *Caines*, 343.) When the plaintiff offers to prove notice given the next day after the demand, it must be understood as intending the next day proper for the transaction of secular business. At least, it ought so to have been considered by the Court, until the plaintiff had been called on to answer whether, by the evidence, it was intended to prove notice on *Sunday*.

It is also objected, that a demand made by *Williams* could be of no avail, on the ground, it is presumed, that he was not the holder when the note fell due. Notice must, un-

doubtedly, be given by the holder or his agent. *Williams* sold the note before due ; but it is to be inferred, that he had the possession of it when he demanded payment, and must be considered the agent of the holder for that purpose, until it is shown he acted as a stranger, and without authority. We cannot pre-judge this question, previous to an inquiry, in what character and by what authority *Williams* acted. Had the evidence been admitted, the defendant might then have pursued the examination, and had it appeared, subsequently, that he did not stand in a situation to make a legal demand, the defendant would be entitled to the benefit of the objection. On the whole, I am of opinion that the judgment ought to be reversed, and a venire *de novo* issued by the *Washington Common Pleas*.

UTICA,
Aug. 1824.

Burr
v.
Van Buskirk.

Judgment reversed.

BURR against VAN BUSKIRK.

REPLEVIN, for certain goods and chattels of the plaintiff, alleged in the declaration to have been taken *May 8th, 1821*, at house No. 280, *Broadway*, city of *New-York*.

The 13th section of the act concerning distresses, &c. giving a right to distress goods within a

certain time after they are removed, is confined to the continuance of the lease, or the continuance of the landlord's right and the tenant's possession. Though the landlord's right continue, if the tenant's possession have ceased, there cannot be a distress, within that section, of the tenant's goods removed off the demised premises, though such distress be made within 30 days after the rent fell due.

An avowry of taking goods off the demised premises, for rent arrear, should show affirmatively, that such possession continued, if the lease have expired, or it will be bad on general demurrer.

The 13th section of the act concerning distresses, &c. (1 *R. L.* 437) as amended by the act, (sess. 42, ch. 194, s. 7) authorizes the taking of goods which are removed off the demised premises, within 30 days after the rent for which they are distrained falls due ; but they cannot be distrained for rent which fell due more than 30 days previous to the distress.

The common law did not allow a distress off the premises.

Previous to a distress for rent in the city of *New-York*, the landlord must file an affidavit with the clerk of the city and county, that the rent distrained for is due, according to the act, (sess. 38, ch. 153.)

The avowry must aver that this was done, or it will be bad on demurrer.

An avowry substantially bad in part is bad for the whole. *E. g.* In an avowry for rent, arrear of taking goods off the demised premises, if only a part of the rent avowed for is the subject of distress, the avowry is bad for the whole.

UTICA,
 Aug. 1824.
 Burr
 v.
 Van Buskirk,

Acowry, substantially as follows : " And the said defendant defends the *wrong*, and injury, when, &c. and well avows, &c. because he says that at the time of making the demise unto the said plaintiff, hereinafter next mentioned, and from thence, &c. and at the said time when, &c. he, the said defendant, was and still is lawfully possessed of a certain unexpired term of 30 years from the 25th day of *March*, *A. D.* 1804, of and in all that certain lot, &c. (*describing certain premises in the city of New-York*) and whereof the Rector and inhabitants of the Protestant Episcopal Church in the state of *New-York*, on the said 25th day of *March*, were, &c. seised, &c. in fee ; and which, on, &c. they demised to the said defendant, for the term aforesaid, to wit, at, &c. ; and being so possessed, &c. before the said time when, &c. to wit, on the 7th day of *November*, *A. D.* 1816, at, &c. the said defendant, by a certain note or memorandum in writing, bearing date the same day and year last aforesaid, and signed as well by the said defendant as by the said plaintiff, demised to the said plaintiff, and he, the said plaintiff, then and there rented of the said defendant, all that certain dwelling-house and premises, known as house No. 61, *Vesey-street*, in the city of *New-York*, with its appurtenances, being part and parcel of the said lot, piece or parcel of land herein before mentioned and described, and which the said Rector, &c. had heretofore demised to the said defendant, and whereof he was possessed as aforesaid, *to have and to hold*, &c. to him, the said plaintiff, for and during the term of 5 years, from the 1st day of *May*, (then) last past, &c. at and for the yearly rent of \$250, &c. payable quarterly, &c. on the 1st days of *August*, *November*, *February*, and *May*, in each and every year of the said term, &c. in and by even and equal portions of \$87,50, on each, &c. By virtue of which said demise, &c. he, the said plaintiff entered, &c. and because the sum of \$350, for the rent aforesaid, for a part of the 2d quarter and the whole of the two last quarters of the last year of the said term of 5 years, ending on the 1st day of *May*, *A. D.* 1821, and from thence until, and at the said time when, &c. was due and in arrear from the said plaintiff to the said defendant, the residue of the said rent and sum of \$350, for

the said last year, to wit, the sum of \$87,50 for the 1st quarter, and \$12,50, in part and on account of the 2d quarter of the said last year of the said term of 5 years, with all the previous rents having been paid and satisfied; and because the said plaintiff, within 30 days next before the taking of the said goods, &c. or any part thereof, to wit, on the same day and year in the said declaration mentioned, had conveyed and carried off from the aforesaid premises, so as aforesaid demised to him, the said goods and chattels in the said declaration mentioned, being the proper goods and chattels of the said plaintiff, leaving the aforesaid sum of \$250, above mentioned, as parcel of the said rent as aforesaid due and unpaid, and had conveyed and carried the said goods and chattels into the said dwelling-house in the said declaration mentioned, in which, &c. he, the said defendant, well avows the taking the said goods and chattels in the aforesaid dwelling-house, in which, &c. at the said time when, &c. after the aforesaid sum of \$250, &c. was so in arrear and unpaid as aforesaid, and being within 30 days next after the said goods and chattels, were and had been so conveyed and carried off and from the aforesaid premises demised to the said plaintiff as aforesaid, and justly, &c. as and for a distress for the said sum of \$250, &c. and which said sum of \$250, still remains due and in arrear to the said defendant, &c. to wit, at, &c. and this, &c. wherefore, &c."

A 2d and 3d avowry followed this, being substantially the same as the first, for the purpose of the questions raised by the counsel or determined by the Court.

Demurrer and joinder to each avowry, assigning, for causes of demurrer, 1. That, upon the facts set forth, the defendant would not have been entitled to a distress at common law; and the avowries shewed no custom, and referred to no statute authorizing the distress. 2. That the avowries were introduced by the words, "comes and defends the *wrong* and *injury*," &c. whereas they should have been "*forcé* and *injury*," &c. 3. That it did not appear by the avowries, that the defendant, previous to making the distress, complied with the requisitions of the "act concerning distresses for rent in the city of New-York," passed April 11, 1815, by making

UTICA,
Aug. 1824.

Burr
v.
Van Buskirk.

UTICA,
Aug. 1824.

Burr

v.

Van Buskirk,

an affidavit of the amount of rent due, and filing it as required by that act. (*Vid.* 3 *Laws*, sess. 38, ch. 153.) Nor did the avowries in any way refer to the act.

A. Burr, in support of the demurrers.

(a) 1 *R. L.*
437.

1. The defendant avows upon the 13th section of the act of 1813, commonly called the landlord and tenant act, (a) which allows the landlord to follow the goods for 30 days after their removal, and after the rent becomes due. This section does not authorize a distress, after the determination of the lease. The 17th section of this act gives that power, under several restrictions, one of which is, that the distress, after the determination of the lease, must be made during the continuance of the tenant's possession. But this section does not allow the distress to be made off the premises. That is done by the 13th section, but then the distress must be made during the continuance of the lease. By common law a distress could not be made off the premises. We have no statute authorizing a distress, after the determination of the lease, *off the premises*; nor have the English. Such a distress would be illegal.

In his avowries, the defendant shews that he distrained the goods after the lease was determined, and off from the premises, bringing himself within the provisions of the 13th section; and, *mutatis mutandis*, he follows the English precedents under 8 *Anne*, c. 14, s. 1, 2, from which the 13th section of our statute is taken. The 6th and 7th sections of this statute of *Anne*, give the power of distress after the determination of the lease. The 17th section of our statute is, in all essential parts, a transcript of the 6th and 7th sections of *Anne*.

(b) Sess. 43,
ch. 194.

2. The 13th section of the act of 1813, upon which the defendant avows, is repealed by the 7th section of the act of 1820. (b) He has, therefore, shewn no authority for making the distress; for a distress at common law was not allowed off the premises. This is good cause of general demurrer.

3. The avowries do not shew a conformity to the requisitions of the statute of the 11th April, 1815, (sess. 38, ch. 153) which requires an affidavit to be made and filed previ-

only to a distress, in the city of *New-York*. This is a publick act, though not declared to be so expressly ; for it is, in effect, only an amendment to the general act relating to the city, of 1813, which is publick ; and it creates a penalty which is equivalent to a forfeiture ; and it concerns the people, for they must sue for the penalty.

4. The defendant confesses a distress off the premises, for rent which had been due longer than 30 days. This is not authorized by any statute ; and if the defendant had avowed upon the right statute, (*statute of 1820*) he would be a wrong-doer, by his own shewing ; for the statute of 1820 extends the power of distress off the premises, to 30 days only, after the rent became due ; so that he had only a right to distrain for the last quarter ; what remained upon the previous quarter having been due more than 30 days before the distress. The avowries are entire, and being bad for part, are bad for the whole.

5. The fee in all the avowries, is laid in the corporation of Trinity Church. Corporations cannot hold real estate without authority by statute, and no statute is set out or referred to, giving that authority.

E. Williams, contra. The answer to the first cause of demurrer is, that the right of distress, in all cases, is incident to the lease, and herein the *act is a public one*. The Court will take notice of it, without its being pleaded or referred to.

The formal objection, that *wrong* is used instead of *force*, is contradicted by all the precedents of avowries, to be found in the books of practice. The word "*force*," is not substituted for "*wrong*" in all actions of *tort*. It is *only* used in such actions of *tort* as are accompanied by *force*, such as *trespass vi et armis*, either to the person, or to property real or personal. But no *force* is presumed in replevin. The gist of his action consists *not* in the *wrongful taking*, but in the *wrongful detaining* of the goods, &c. which negatives the *idea of force*.

If no affidavit was made or filed, the plaintiff should have availed himself of the omission by plea. It is in the nature of a *proviso* in the statute, and the party pleading need not

UTICA,
Aug. 1824.

Burr
v.
Van Buren.

UTICA,
Aug. 1824.

Burr
v.
Van Buskirk.

negative or aver it in the first instance, but may leave himself, if the opposite party should take advantage of it by plea, to reply as the facts and nature of the case may require.

The old statute, giving a right to distrain goods off the premises, was an enlargement of the common law right of distress; an extension of that right to goods removed off the demised premises, if exercised within 30 days after the goods are removed, for any rent which would reach them on the premises, provided they had continued there during that time. But the provisions of the 13th section of that act(c) were defective. If the tenant removed his goods more than 30 days before the rent fell due, he evaded the distress. The rent not being due at the time of the removal, the landlord could not then distrain; and when the rent accrued, his right was no better, because the 30 days had expired. It being found that the 13th section of the old act thus defeated its own object, it was amended by the 7th section of the statute, (*sess. 43. ch. 194.*) which extends the right conferred by the old law to 30 days after the rent falls due, leaving it in full force as to all the rent which had fallen due at any time previous to a removal of the goods. The last repeals only the repugnant parts of the previous section. Standing together, they read thus: "the landlord may distrain the goods for any rent due at the time of, or within 30 days after their removal, and for any rent which may afterwards accrue, within 30 days after it becomes due and payable." The old was repugnant to the new section in the single particular only, that it confined the taking in all cases to 30 days from the act of removal. The entire rent became due the 1st of May, and the landlord had a right, within these statutes, to an entire distress for the whole, within 30 days after the removal. The opposite construction would drive the landlord to different remedies, for different quarters of the same rent.

Curia, per WOODWORTH, J. It appears from the avowries that the defendant demised to the plaintiff certain premises in New-York, for the term of five years, ending on the 1st May, 1821, at the yearly rent of \$350, payable quarterly. The defendant avows the taking of the goods off the premises, on the 8th May, 1821, for \$250 rent in arrear, being for

UTICA,
Aug. 1824.

Burr
v.
Van Buakirk.

the rent of the two last quarters, and a part of the second quarter of the last year ; the plaintiff having removed the goods from the demised premises within 30 days previous to the time of making the distress. The lease having terminated on the 1st May, 1821, the first question is, whether the remedy by distress is applicable to this case.

The 13th section of the act concerning distresses, (1 R. L. 437,) declares, that if the lessee, shall convey his goods or chattels from the demised premises, leaving the rent unpaid, it shall be lawful for the lessor, within 30 days, to seize the goods as a distress. The remedy thus given is operative, during the continuance of the lease only. After the term has expired, the lessor, by this section, had no other than the common law remedy, which did not allow a distress off the premises. That this is the construction to be given, is apparent by adverting to the 16th and 17th sections of the same act, which, after reciting that lessees for years frequently hold over the tenements demised, after the determination of the lease, and that after the determination of such lease, no distress by law can be made for arrears of rent that grew due previous to such determination, gives the right to distrain in such cases, in the same manner the lessor might have done, if the lease had not been determined ; provided the distress be made within six months, and during the continuance of the landlord's title, and during the possession of the tenant, from whom the rent became due. In this case, the distress was made within the time limited ; the landlord's title continued ; but there is no averment that the plaintiff's possession continued. The question, then, arises, is the avowry good on general demurrer, without alleging that the plaintiff continued in possession of the demised premises when the distress was made ? It is a general rule that matter, which should come more properly from the other side, need not be stated. Unless the plaintiff's possession continued, there was no right of distress ; it was therefore matter of substance to allege the fact, in order to support the avowry. The proviso forms no part of the plaintiff's title ; he declares for unlawfully taking his goods. The de-

UTICA,
Aug. 1824.

Burr
v.
Van Buskirk.

defendant must rely on the right given by the 17th section, to support his avowries. That right is not general, but qualified. Without bringing himself within the proviso, the Court cannot say that any right to distrain existed. The proviso may be said to furnish matter of excuse or justification for the defendant, and need not be negatived in the declaration. (*Teel v. Fonda*, 4 John. 306.) I think the avowries bad on this ground.

There is another objection which seems to be conclusive. On the 13th April, 1820, (5 vol. L. 178, b.) an act passed to amend the act of April 5, 1813, concerning distresses. This was prior to the distress made, and, so far as it applies, must govern. It has made some material alterations, as to the right of the landlord to distrain. The 7th section declares that the landlord, within 30 days after the rent shall become due, may seize, as a distress, the goods or chattels of the lessee, which may have been conveyed away, or carried from the demised premises, and that so much of the 13th section of the act of 1813, as is repugnant thereto, be repealed. Here, then, it is manifest, that even if the defendant had brought himself within the proviso of the 17th section of the preceding act, his right must be governed by the 18th section as amended by the 7th section of the act of 1820. The effect of the amendment is to take away the right to seize the goods within 30 days after they were carried away, and, instead thereof, to authorize a seizure within 30 days after the rent became due. In this respect, the 13th section is repugnant to the 7th section. Before the passing of this act, the landlord, by virtue of the 17th section, could, if within its proviso, distrain in the same manner he might have done if the lease had not been determined; that is, he might take the goods without reference to the time the rent became due, but within a certain time after they were conveyed away. After the act of 1820, there was no right to distrain goods off the premises in any case, but from the time the rent was payable. Although the general right to distrain, after the termination of the lease, is six months, by the 7th section, that right cannot be exercised, where more than 30 days have elapsed after the rent became due.

This alteration materially affects the security of the landlord; it is thereby lessened. Before the *13th April*, 1820, if, at the end of the third quarter, the tenant removed his goods, the landlord might distrain within 30 days, for three quarters rent; but now, on the same state of facts, he can only distrain for the rent of the third quarter; because no more than that became due within thirty days. The landlord's right is, in like manner, restricted, where the term has ended: he would only be authorized to distrain for the last quarter of the term, because all the preceding quarters had been due more than 30 days; and, as to the last quarter, the right is lost unless exercised within that period.

UTICA,
Aug. 1824.
Burr
v.
Van Buskirk:

In the avowries pleaded, the defendant claims rent for the third, fourth, and part of the second quarter, amounting to \$250, and has distrained for that sum. All but the last quarter had been due more than 30 days, and the second quarter more than 6 months. The defendant had no right to distrain for more than the last quarter, and consequently the avowry is bad for all beyond that amount. Being materially defective in part, it is bad for the whole on general demurrer.

There is another defect in the avowry, which I incline to think material. The act of *11th April*, 1815, (3 vol. L. 156, s.) declares that no landlord shall distrain in the city of *New-York*, before making an affidavit, stating the amount due for rent, and filing the affidavit in the Clerk's office. There is no averment that this step has been taken. Without it, the distress was illegal. This being matter within the knowledge of the defendant, and necessary for his defence, the fact ought to have been alleged in the avowry.

Judgment for plaintiff on the demurrer, with leave to the defendant to amend.

Rule accordingly.

UTICA,
Aug. 1824.

Rew
v.
Barber.

REW against BARBER. [Vid. S. C. by the title of *Rew v. Barker*, 2 Cowen's Rep. 508, where the record was amended as to the time of sale.]

Where a sheriff levied on a horse under a *fi. fa.* and conveyed him to the plaintiff in the *fi. fa.* who directed him to return the horse to the defendant, which he did, and left him there in the defendant's possession, who sold the horse to R. who sold him to B. who purchased *bona fide*, without notice of the levy, from whom the sheriff took him, and sold him at auction under the execution; the first sale to R. was also *bona fide* and without notice of the levy; in an action by B. against R. upon a breach of the implied warranty of title, held, that B. was entitled to recover.

Merely leaving property levied upon in

the possession of the defendant in the execution, though with the plaintiff's consent, is not, *per se*, fraudulent, either as against subsequent creditors or purchasers.

Otherwise, where the sheriff is directed to delay the execution or sale.

The acceptance of the note of a 3d person on the sale of a chattel, for the consideration money, is payment.

It is equivalent to the payment of money, and on a failure of title, an action lies for money had and received, to recover the amount of the consideration money and interest.

Assumpsit is the proper form of action, where there is a warranty of title express or implied in the sale of a chattel.

A warranty of title is implied on the sale of a chattel.

ERROR from the Court of Common Pleas of the county of Onondaga. Barber sued Rew, in the Court below; and declared against him for money lent, and money had and received. Plea, the general issue. The cause was tried at November term, 1819, when the jury found a special verdict as follows: "That on the 19th November, 1818, Rew (the defendant below) sold a certain brown horse to Barber, (the plaintiff below) for \$111; and the plaintiff paid him in a note against one Shankland, for \$130, the defendant giving his note to the plaintiff for the balance; that in the month of October, next previous to the sale, Jabish Castle, one of the deputies of the Sheriff of Onondaga, having a *fi. fa.* for \$59, in favor of Elijah Rust against Peter W. Yates, who then owned the horse in question, came to the house of Yates, and levied on the horse; that, at the time of the levy, there were two other horses, two cows, and his library, and farming utensils in the deputy's sight and power. He did not take any inventory of them as levied on; but, considering the horse as sufficient, took him away, and carried him to Aaron Benedict, who then bought the execution, and requested him to keep the horse; but directed him to take the horse back and leave him in Yates' custody; which he accordingly did. Yates soon after sold the horse to the defendant, who purchased him in good faith, without knowledge of the levy. That in the month of November, next thereafter, Castle received another *fi. fa.* in favor of Benedict against Yates, which he levied upon all the property of

Yates, taking an inventory of it under the second execution. The horse having been previously sold by *Yates*, was not in his possession at the time of the second levy. *Castle* then advertised for sale, all the property levied on by the two executions, generally, without discrimination, and having taken the horse from the plaintiff previous to the day of sale, proceeded to sell the other property first, without reference to any specific execution, until it was exhausted. The sales amounted to several hundred dollars, being enough to satisfy the second execution, and \$4 over. He then set up the horse on the first execution, sold him for \$54, to one *Daniel Wood*, who bid in behalf of *Benedict*, and delivered him to *Wood*. Both executions were returnable at *November* term, 1818; and the second levy was prior to the return day of the first. But whether, &c. and pray, &c. and if, &c. they assess the damages of the plaintiff to \$118,77, &c. But if, &c." Judgment for the plaintiff below on the special verdict, whence the defendant below brought error to this Court.

UTICA,
Aug. 1824.

Rew
v.
Barber.

Talcott, (Attorney General) for the plaintiff in error. 1, Leaving the horse in *Yates*' possession rendered the levy fraudulent and void against purchasers as well as creditors. Sending the horse back to *Yates* discharged the lien, and his sale to a *bona fide* purchaser conveyed a good title. No doubt there was a valid levy originally ;(a) but it was discontinued. Suffering property levied upon to remain with the debtor is fraudulent and void as against subsequent executions. This is the general rule as recognized in *Whipple v. Foot* ;(b) though the removal of a growing crop was excused as being an exception to the rule, founded in necessity. And in *Storm v. Woods*,(c) the general rule is laid down and enforced in terms, " that if a creditor seize the goods of his debtor, on an execution, and suffer them to remain in his hands, the execution is deemed fraudulent and void against a subsequent execution. This rule, say the Judges, has been long established in the English Courts,(d) and is founded upon reasons best calculated to prevent fraud." Yet it is not necessary, in this case, to contend that an actual remo-

(a) 2 John.
Rep. 422.

(b) *id.* 418.
(c) 11 John.
112.

(d) 1 *Wils.*
44. 1 *Salk.*
720, 721. 1
Ld. Raymond,
251. 5 *Mod.*
377. 7 *Mod.*
37. 2 *T. R.*
287, 598. 1
Tidd's Pr. 919,
920. 1 *Exp.*
Rep. 205. 1
Campb. Rep.
333.

UTICA,
Aug. 1824.

Rew
v.
Barber.

(e) 4 *Yeates*
Rep. 477, 478-
9.

(f) *id.* 194.

(g) 4 *Dall.*
338.

(h) *id.* 213.

val is necessary. The creditor does more to indicate fraud than a mere neglect to remove. After having the property removed, and in the actual custody of the deputy, he relinquishes all control over it, and sends it back to the debtor, as if the execution had been discharged. It was giving *Yates* a false credit, and exciting a confidence, upon the strength of which *Rew* became a purchaser. As such, it comes directly within the language of the Court in *Knox v. Summers*; (e) and in the previous case of *The Guardians of the Poor of Philadelphia v. Lawrence*, (f) the Court decided, that where the plaintiff, or his attorney, deems it necessary to put an officer in the defendant's house, to preserve the lien of an execution, the withdrawing him, and suffering the defendant to go on as usual with his business, is a relinquishment of the execution. The Court admit that, by the practice of *Pennsylvania*, the plaintiff does not lose his lien on a *fi. fa.* by the Sheriff's not removing the goods levied upon, unless their continuance in the defendant's possession led to a false credit, and injured third persons. They say that the practice, however, is different in *England*, which had been adopted by the U. S. Circuit Court for that district; that it is held, in *England*, that the goods of the defendant must be removed to a place of safe custody, within a reasonable time, otherwise the officer who was placed in the house would become a trespasser; and that the late practice in the city of *Philadelphia* was the same; that the plaintiff's attorney having proceeded according to that practice, but withdrawn the officer, this must be deemed a relinquishment of the effect of the execution. In the *United States v. Conyngham*, (g) the naked point was decided by the Circuit Court of the *United States*, that leaving goods with the defendant in the execution is fraudulent as to subsequent executions. In *Chancellor v. Philips*, (h) the Supreme Court of *Pennsylvania* decided the very point in question here, admitting it to depend upon a mere neglect to remove the goods. The Sheriff had levied on a kiln of unburnt bricks, and other property, in *June*, 1798, but suffered them to remain in the defendant's possession till *April*, 1799, when, on putting them up for sale, it was found that one of the defendants had sold the bricks to

a *bona fide* purchaser, without notice of the levy. The Sheriff, at the time of the levy, employed a man to call at the brick yard occasionally, but did not keep any person constantly there. On this state of facts, it was decided, that the purchaser should hold the bricks; although the Court agreed, that a different practice had prevailed and been established in cases of a levy upon household furniture, which might be left with the defendant without prejudice to the levy. The present is certainly a stronger case for the purchaser, as the acts of abandonment are much less equivocal.

2. But if we are wrong in supposing that all lien was lost, we then say that the evidence does not support the declaration. The action was for money lent, and money had and received; whereas, in fact, no money passed between the parties. But, if otherwise, it is, at least, questionable whether such an action will lie to try the title upon a breach of warranty.

S. A. Foot, contra. I am not aware that it can make any difference in principle, whether the horse was returned to *Yates* with or without the consent of the plaintiff in the execution, or his assignee. This is not a litigation between him and the purchaser, or between the Sheriff and the purchaser; but it is an action by a purchaser, two removes from *Yates*, the defendant in the execution, against the first purchaser, upon the implied warranty of title. The second purchaser, deriving title from *Yates*, buys and takes possession, which possession is divested by the Sheriff, who claims a prior title under *Yates*. We must, then, look to the source whence these two derive their title. Had *Yates* a title, and a right to sell and pass the property to the defendant below? As between *Yates* and the Sheriff, had the former a title? This is the true inquiry; because the purchaser must always take care as to what right passes by the sale; and if it fails, he must look to his vendor. If *Yates* had no title, how could he give one to *Rew*, and *Rew* to *Barber*? The cases cited are all, I presume, where the question raised was directly between the plaintiff in the execution levied, and some third person claiming, as against him, the priority either as

UTICA,
Aug. 1824.

Rew
v.
Barber.

UTICA,
Aug. 1824.

Rew
v.
Barber.

a creditor or purchaser. I agree that where the plaintiff either levies or purchases, and leaves the property remaining in possession of the debtor, he cannot enforce *his* claim directly against third persons.

It is conceded that this was a good levy; and if so, *Yates*, had no right to sell. Whatever the Judges of *Pennsylvania*, or the U. S. Circuit Court of that state, may say upon this question, we have our own settled law as to what shall constitute a levy. It is not material, even at the beginning, that the Sheriff should take the property into his actual possession. If he sees it, and has it within his reach, and under his control, it is enough. This constitutes a levy; and does the law require that the acts of possession should be more distinct and open, in order to continue a levy, than to constitute the levy itself? The mere taking an inventory, without any farther act, would clearly amount to a levy, the Sheriff having the property within his power; or any other act manifesting a mere intention to take it. (i) If the levy was good, it follows, as a necessary consequence, that the Sheriff may afterwards take the property, wherever he can find it. If a levy is good, and good even without actual possession, how can it come to nothing, from the mere want of actual possession? If the levy was good, the argument of the other side fails entirely. At any rate, it is not inquirable between these parties, whether the Sheriff took or retained the property in his actual possession, or not. Is it to be endured, that *Barber*, a purchaser, shall be made accountable for the irregularity of the Sheriff's proceedings? It is enough that these were regular on their face. Is a purchaser bound to examine all the Sheriff's acts in detail? The horse was taken from our possession, and sold for *Yates'* benefit, who was the first vendor. The burthen of the litigation is thrown upon us, and we had the right, on an authority being presented which is regular on its face, or apparently good, to surrender the property, without further inquiry. The vendor is bound to afford the vendee a full indemnity against every claim of title, *prima facie*, good; and all he can exact is, that the vendee should keep the property till a claim is presented apparently fair.

(i) *Haggerty*
v. *Wilber*, 16
John. 287.

The case of *Witherby v. Mann*, (j) and *Barclay v. Goock*, (k) decide that we had a right to treat the note given in consideration, as money. It was received in payment. (l) The consideration having totally failed, it is well settled that we may disaffirm the contract, and bring our action for the consideration money paid.

UTICA,
Aug. 1824.

Rew
v.
Barber.

(j) 11 John.
518.

(k) 2 Esp.
Rep. 571.

(l) id. *ibid.*
Whitbeck v.
Van Ness, 11
John. 409.

The *Attorney General*, in reply. The gentleman is certainly mistaken in his doctrine as to the extent of indemnity which the vendor is bound to yield. It is true, that if the vendee gives notice to the vendor, of a suit pending against the former, in which the title is involved, a recovery against him, upon whatever foundation, will render the vendor liable ; but this Court have established no rule by which he is entitled to indemnity for vexatious claims, however plausible. It is a strange doctrine, that the vendee shall be paid the value of the article, by the vendor, merely because the claim upon which he surrenders the property is, *prima facie*, good. Suppose it had appeared that the judgment had been released, a fact which the vendee might not know, but yet he thinks proper to surrender the article sold : how do we stand, within the rule contended for on the other side ? We cannot bring an action for the horse, because we have sold, and have no title. The vendee, alone, can vindicate the true claim ; and if he is protected, in the surrender, by a *prima facie* case, and can recover over against us, we are left without remedy.

The question between these parties must be the same as between any others. If the Sheriff had been sued by *Barber*, for his wrongful act in taking the property, he could not have set up his execution and levy as a defence. The question would be, in that case, as it is here, whether the levy had not been waived ? Suppose the horse had passed through 500 hands, by as many sales : the derivative title of the last vendee must depend upon the very same inquiry as would be pertinent between the plaintiff in the execution and third persons, or between him and the Sheriff, in reference to the rights of third persons. Is the title of a remote vendee to

UTICA,
Aug. 1824.

Rew
v.
Barber.

be assailed, in this manner, by a dormant execution, merely because an ultimate remedy by suit may be had against, perhaps, an insolvent vendor? The very man who seeks to avoid the sale, is the one who put it in the power of the defendant, the original insolvent vendor, to make the sale. The plaintiff in the execution was a party to the fraud, and comes to avoid the sale in his own wrong.

Curia, per WOODWORTH, J. It is found, by the special verdict, that on the 19th November, 1818, the defendant in the Court below sold a horse to the plaintiff, and received in payment a note against a third person.

In October, previous to the sale, the Sheriff levied on the horse, under an execution in favour of *A. Rust*, against *Peter W. Yates*, the horse then being his, and brought the horse to *Benedict*, who purchased the execution, and directed the Sheriff to return and leave the horse in the custody of *Yates*. *Yates* soon after sold to *Rew*, the plaintiff, who purchased in good faith, without knowledge of the levy. In November, the Sheriff received another execution, in favour of *Benedict*, against *Yates*, and levied on all his property. The Sheriff took the horse from *Barber*, and sold under both executions. *Benedict* became the purchaser of the horse.

If the plaintiff's title has failed, he has good cause of action against the defendant. That will depend on the question, whether leaving the horse in the possession of *Yates*, rendered the execution fraudulent? There was no direction to suspend or delay the execution, or permission to *Yates* to use the property. The case of *Whipple v. Foot*, (2 John. 416) is relied on, by the plaintiff in error, to shew that the execution was fraudulent. In that case, the Sheriff levied on wheat growing, and several months afterwards, when the wheat was ripe for harvest, cut and carried it away, and sold it at auction. A subsequent execution was issued, and levied on the same wheat, in the sheaf. It was held, that the first execution was not dormant, the Sheriff having taken all the possession of which the nature of the chattel was susceptible; that it could not be considered as coming within the opera-

tion of the rule, that if a creditor seize the goods of his debtor on execution, and suffer them to remain in his hands, the execution is deemed fraudulent and void against a subsequent execution. As the chattel, in that case, could not be removed before harvest, the execution could not be affected by the omission, admitting that the single fact of directing property levied on to remain with the debtor, until sale, would, in general, render it fraudulent. It was not necessary to decide this last point, for the cause did not depend on it. But mere possession by the defendant will not affect the creditor's claim, or give a second execution priority. The cases cited do not support the doctrine to that extent. In *Edwards v. Harben*, (2 D. & E. 596) it was held, that where an absolute bill of sale was given, and the creditor agrees to leave the goods in possession of the debtor, it is fraudulent against creditors. But this, I apprehend, has no connexion with the question of permitting the goods to remain with the defendant in the execution, after levy, until the day of sale. The case in 7 Mod. 37, referred to by the Court, corresponds; the creditor caused a levy to be made, but would not spread. The Sheriff proceed farther, and suffered the goods to remain in the custody of the debtor. This was held to be a fraudulent execution, and that a second execution might seize the same goods. The ground here evidently was, making use of the execution as a cover, by directing the Sheriff not to proceed; and is in accordance with the cases in our Courts, where executions have been held dormant, in consequence of directions given by the creditor, to delay, and not proceed: but it is no authority to prove, that the mere possession by the debtor will produce the same result, although the sale takes place as early as the return day of the writ, or within a few days after. The broad principle laid down in *Whipple v. Foot*, is recognized in *Storm v. Woods*, (11 John. 110) and would seem to sanction the doctrine contended for; but it must be understood, that when the Court say, "suffering the goods to remain in the hands of the debtor, the possession is deemed fraudulent," that the debtor retains such execution in consequence of instructions by the creditor to delay, or not to proceed on the execution. The subsequent cases show, that

UTICA,
Aug. 1824.

Reu
v.
Barber.

UTICA,
Aug. 1824.

Rew
v.
Barber.

the latter is the ground upon which this doctrine rests. Thus, in *Doty v. Turner*, (8 *John.* 20) the plaintiff, by his agent, directed the Sheriff to levy on the property, and informed him, that if it remained in the possession of the defendant, after the levy, the plaintiff would not hold the Sheriff responsible, if it was squandered, and that he need not take a receipt for it. After the levy, he did nothing further, until after the return day, and a second execution delivered, when he sold on both. It was held, that as there was no instruction to delay the execution after the seizure, or to let it sleep in the Sheriff's hands, the first execution did not lose its preference. The decision is founded on this, that there was no direction for delay. The Court put it upon this ground, and observe, "therefore, the case does not come within the rule of the common law recognized in *Whipple v. Foot*." All the cases I have met with, proceed on the principle, that the creditor had interfered and directed a delay of sale, and left the goods with the debtor. In every such case, a second *Novation* would have the preference. The Sheriff, ~~in favor of~~ took possession of the horse and sold him; whereby the title of *Barber* failed.

The only remaining question is, whether he has selected the proper form of action. The acceptance of the note of a third person, was payment and satisfaction for the consideration money. (*Whitbeck v. Van Ness*, 11 *John.* 409. 2 *Esp. R.* 517.) Assumpsit is the proper form of action, where there is a warranty, express or implied, in the sale of a chattel. (6 *John.* 168.) A warranty of title is implied, (1 *John.* 274.) The consideration upon which money was paid having failed, it may be recovered back under the count for money had and received.

I am of opinion, that the judgment of the Court below be affirmed,

Judgment affirmed.

UTICA,
Aug. 1824.

Vianna
v.
Barclay.

VIANNA and others *against* BARCLAY and BARCLAY.

CASE, by the plaintiffs, merchants in *Portugal*, against the defendants, commission merchants in *New-York*, for selling a quantity of port wine, consigned by the former to the latter, at a less price than directed, tried at the *New-York* sittings, *November 4th*, 1821.

At the trial, the consignment and delivery of the wine were proved; and the only dispute was, whether the defendants had acted fraudulently or negligently, or had violated the plaintiffs' instructions, by selling below the price to which they were limited; or, if they had done the latter, whether the plaintiffs had not waived the instructions which they gave, limiting the price, by certain acts of recognition subsequent to the sale. These questions depended on a voluminous mass of evidence, including a tedious correspondence between the parties, the whole of which was spread upon the case, and very fully examined by the learned counsel who argued the cause, the only difference between whom related to the result of the evidence. This result, and all the evidence material to a report, being given in the opinion of the Court, I omit a statement of the case here. Verdict for the plaintiff, for \$1500, subject to the opinion of the Court.

A. L. M Donald, for the plaintiff.

J. Duer, contra.

D. B. Ogden, in reply.

Curia, per WOODWORTH, J. From a review of the testimony, it appears, very satisfactorily, that the defendants used reasonable diligence to make sale of the wine to the best advantage. I have not discovered any ground for the

his dissent in a reasonable time; otherwise, his assent to his factor's acts will be presumed.

Letters of instruction from a merchant to his consignee and factor, not expressly mentioning a price below which goods consigned for sale shall not be sold, but merely communicating a belief that the excellent quality of the goods will command a certain price, and expressing it as the sum confidently expected to be realized on a sale, will not be construed as fixing the minimum price at which the goods shall be sold; and a sale for a less sum by the factor, in good faith, and without negligence, will not be deemed a breach of instructions, nor render the factor liable in damages.

Though a factor disregard his instructions, the principal, after advice of this fact, ought to dissent, and give notice of

UTICA,
Aug. 1824.

Vianna
v.
Barclay.

imputation of fraud, while acting as agents and factors of the plaintiffs; and if the defendants are liable, it must be on the ground of a departure from instructions given, as to the terms of sale. This is a question of fact, the decision of which must depend upon the construction of the correspondence between the parties. There is nothing explicit on this point. The letter of *June* 18, 1816, accompanying the consignment of the wine, says, "its price is £52 per pipe," expressing a hope that it may be readily sold, being of superior quality. The defendants, in reply, stated that the market was overstocked; that saving sales could not then be effected; and that the plaintiffs might be assured of their best exertions, *when it could be without a sacrifice*.

I incline to think the plaintiffs did not intend, by the instructions, to fix the minimum price at £52. The expressions seem rather to have proceeded from a belief that the excellent quality of the wine would command that sum; and, therefore, instead of directing generally, to sell for the best price that could be obtained, they specify the sum confidently expected to be realized, probably to prevent precipitancy in the disposition of the property, and induce greater exertions, if, unfortunately, they had consigned to an unfavourable market. The fact that the instructions are somewhat ambiguous, supports this construction; for if an express limitation was in view, at the time, it is reasonable to expect it would have been explicitly given. What was the state of the market was unknown. If unfavourable, it must have occurred to the plaintiffs, how are the defendants to act? Such a state of things would seem to call for explicit directions as to the minimum price. The omission, I apprehend, was not accidental; the plaintiffs intending not to interfere with the sound discretion of their agents.

The answer of the defendants appears to be in accordance with this construction. "They would close the sales when it could be done without a sacrifice." Such was, undoubtedly, their intention, as faithful agents, anxious not to disappoint the expectations of their principal. Had they considered themselves expressly restricted, it is more probable they would have suggested the improbability of effecting a sale,

on the terms required, and the propriety of vesting in them a discretion to act as circumstances might require. The market was such as to warrant this course. But admitting that the words of the letter will bear a stricter construction, or that the defendants, at the time, may have supposed they were limited; this is not conclusive upon them. If, on further reflection and inquiry, they found that the plaintiffs' instructions would justify the course they pursued, they were at liberty to act upon them. The question is not whether the defendants, in the first instance, considered themselves limited, but, were they so by the plaintiffs' instructions?

The plaintiffs, in their letter of *February 3, 1818*, to *S. Weaver*, drew for the net proceeds of the wine, which had been remitted to *London*. They express surprise that it brought so small a price, and suspect fraud on the part of the sellers. Violation of orders is not intimated; when it might be expected, if reliance for redress was placed on this ground. The remedy was, in such case, perfect. It cannot be credited, that if the plaintiffs considered the consignment limited to £52 per pipe, they would have resorted to the question of fraud, instead of pursuing the plain path before them.

On the *2d June, 1818*, the plaintiffs write to the defendants, acknowledging the receipt of the net proceeds. There is no complaint or intimation of dissatisfaction, but a proposition for a joint speculation in corn, which the defendants declined. On the *24th November, 1818*, the plaintiffs wrote to the defendants, expressing, for the first time, dissatisfaction, and claiming to hold the defendants responsible. This notice to the defendants was nearly a year after the plaintiffs had received the net proceeds. If the defendants had disregarded their instructions, the plaintiffs, after advice, ought to have dissented, and given notice in a reasonable time; otherwise, their assent to their agents' acts will be presumed. (12 *John*. 300.) After the letter of the *2d November, 1818*, the defendants had reason to conclude that the authority of the plaintiffs to sell was not questioned. I do not, however, place my opinion on the ground of acquiescence, being satisfied, from an attentive examination of the testimony, that

UTICA,
Aug. 1824.
Vianna
v.
Barclay.

UTICA.
Aug. 1824.

Archibald
v.
Thomas.

the defendants were not restricted as to price, and that the manner of effecting the sale was not, under the circumstances, objectionable. The defendants are entitled to judgment.

Judgment for the defendants.

ARCHIBALD against THOMAS, impleaded with VARNUM.

Bond, dated
July 26th,
1815, with
condition to
pay \$3000,
with interest,
as follows :
\$500, with in-
terest, on the
whole sum un-
paid, from the
1st October,
1815, on or be-
fore the 1st
October, 1816;
and \$500,
more thereof,
with interest,
on the whole
sum unpaid,
from the 1st
day of October
next, on or be-
fore the 1st
October, 1817;
the residue ex-
pressed to be payable in instalments of \$500 yearly in like manner; held, not usurious on the face of the condition. though, upon one construction, every instalment would draw interest from the 1st October, 1815, notwithstanding it might have been previously paid; and thus the 2d instalment might draw 14 per cent. interest, the 3d, 21 per cent. and so in that progression to the last; but to avoid this consequence, held, that the words, "with interest on the whole sum unpaid," should rather be deemed to refer to the interest as well as the principal, and to mean that \$500 was payable on the 1st October, 1817, together with the interest that accrued on the balance of principal subsequent to the 1st October, 1815, and remained unpaid.

DEBT on bond. The defence was usury, apparent on the face of the condition. The usury was pleaded in due form. The cause was tried at the *Warren Circuit, June 17th, 1822*, before his Honor (the late) Mr. Justice YATES.

On the trial, the execution of the bond was proved by one of the subscribing witnesses. It was executed by the defendants, payable to the plaintiff, dated *July 26th, 1815*, and in the penalty of \$6000. The condition was as follows : "That if the above bounden *Joshua Thomas* and *Aaron Varnum*, their heirs, &c. shall well and truly pay or cause to be paid to the above named *James Archibald*, his executors, &c. 3000 dollars, with interest, as follows, to wit: 500 dollars, part thereof, with interest on the whole sum, from the 1st day of *October* next, on or before the 1st day of *October, 1816*; and \$500 more thereof, with interest on the

Where a contract admits of two significations, that should be adopted which renders it operative, rather than that which renders it void.

If a contract is susceptible of two constructions, one of which will bring it within, and the other without the statute of usury, the latter construction should be adopted.

A contract reserving more than legal interest, on its face, is, *prima facie*, evidence of a corrupt agreement, which is the foundation of usury; but this may be repelled by shewing that more than legal interest was reserved by mistake, e. g. a mistake of the scrivener in wording the bond, whether such mistake be of the fact or of the law.

The court have the exclusive power of deciding whether a contract be usurious on its face.

A contract to pay interest, generally, means the legal standard of interest.

whole sum unpaid from the first day of October next, on or before the 1st day of October, 1817 ; and 500 dollars more thereof, with interest on the whole sum unpaid from the 1st day of October next, on or before the 1st day of October, 1818 ; and 500 dollars more thereof, with interest from the 1st day of October next, on the whole sum unpaid, on or before the 1st day of October, 1819 ; and 500 dollars more thereof, with interest on the whole sum unpaid from the 1st day of October next, on or before the 1st day of October, 1820 ; and 500. the residue thereof, with interest from the 1st day of October next, on the whole sum unpaid, on or before the 1st day of October, which will be in the year of our Lord 1821, without any fraud, &c. then, &c. otherwise, &c."

UTICA,
Aug. 1824.
Archibald
v.
Thomas.

The counsel for the defendant then submitted whether the defence was not made out by the reading of the bond, as the plea, alleging usury, adopted the very words of the condition, and the plaintiff, by his general replication, admitted that the plea was competent ; and thereby putting in issue the facts only which were proved by the bond and condition underwritten ; that if the plaintiff had intended to take issue on the inferential averment, that the agreement was corrupt and usurious, he should have answered by demurrer : but the Judge decided that the replication put in issue not only the facts pleaded as constituting the usury, but the averment of the plea that the agreement was usurious. The counsel for the defendant then proposed going to the jury upon the evidence of usury afforded by the bond. This the Judge refused to permit, deciding that, as the bond was the sole evidence upon the point, the question was one of law—not of fact ; and belonged to the Court—not the jury. He thereupon gave his opinion, that the word *unpaid* in the condition of the bond qualified the words which immediately preceded it ; and that the interest was intended by the parties to be computed, after the payment of one of the instalments, on the whole sum unpaid only, and not on the whole sum of 3000 dollars ; and the jury, pursuant to his direction, found a verdict for the plaintiff.

UTICA,
Aug. 1824.

Archibald
v.
Thomas.

H. B. Davis, for the defendants, now moved for a new trial. He repeated the arguments used before the Judge at the Circuit ; and added, that the objection did not rest upon the bond, carrying usury for too large a sum, but for too long a time. The condition is palpably usurious on its face, if the words used are to be taken in their ordinary import. The excess reserved is enormous ; and, on a calculation, the Court will perceive that it will exceed \$1200. The Court have nothing to do with any supposed mistake of these parties. They are confined to the face of the contract ; or, if going out of it upon evidence *aliunde*, would be tolerated, there is here no such evidence, from which the usurious intent can be explained away. It will not be pretended that the Court can take judicial notice of a mistake, whether of the law or of the fact, in the scrivener who drew the bond. If there was any such mistake, the burthen of shewing it lay with the plaintiff ; and the Judge erred in not requiring this. In either view of the case, the jury should have been permitted to pass upon the issue. The question whether there was a corrupt agreement within the statute of usury was one of fact—not of law, as decided by his Honor. If it appear, on the face of the contract, that more than legal interest was reserved, this is *prima facie* evidence, at least, that the contract was usurious ; and the jury should have been directed so to consider it.

If we are correct in supposing that the parties are concluded by the face of the contract, then the plaintiff should be non-suited. There can be no use in going back to a new trial ; because no other evidence can be given, and no other view taken of the subject than what is already before the Court.

R. Weston, contra. The Judge was right at the trial, in not suffering the jury to pass upon the question ; because the proof of usury was the written contract only. This was susceptible of construction ; and the construction of contracts belongs to the Court, and not to the jury. The contract, upon the face of it, is not usurious. The statute declares all contracts to be void, on which more than seven *per cent*

shall be reserved, &c. In this case, there is no *specific sum* agreed upon as interest, exceeding the rate of 7 per cent. nor is there any *rate or per centage* agreed on; one of which is necessary, to bring the contract within the statute. The *quantum* of interest is thus left by the parties to be fixed by the Court; and it would be absurd to say, when, by the agreement, the parties leave it to the *law* to determine how much interest shall be paid, that the parties thereby intended to violate the law. The intent of the parties is to govern—and not the words used. (*Bac. Abr. tit. Usury, (D) 4. ib. (C) 23. Cro. Eliz. 642. Comp. Rep. 770.*) The parties meant annual interest. The blunder arose from the fact that interest commenced 3 months after the date of the bond. The innocence of the intent is also inferable from that circumstance. The debt is honestly due; and Courts incline to such a construction as will take the contract out of the statute of usury. (*Bac. Abr. tit. Usury, (C) note to pl. 4. ib. (K) 12.*)

In construing the bond, the word “*unpaid*” may be understood to relate to the *interest* as unpaid, and not to the principal. Thus; “interest on the whole sum whereon interest shall remain unpaid.” Or the words “from the first day of *October* next,” may be construed to relate to the last antecedent, viz. “whole sum,” and not to the interest; or these words may be rejected as unmeaning.

The plea of usury always sets up a previous agreement to pay a particular sum; and that, in pursuance of such corrupt agreement, the contract in question was entered into, &c.; and this agreement must be proved precisely as pleaded. But, here, the defendant produces no proof of a corrupt agreement, and relies on the bond, which is indefinite. This cannot support the plea. If the usury is apparent on the face of the instrument itself, the defendant ought to demur. If not apparent, he must plead the usurious agreement, and prove it on the trial by evidence *dehors* the contract. (*Cro. Car. 501. Bac. Ab. Usury, (K) pl. 14.*)

If the opinion of the Court should be against the plaintiff, then a new trial must be awarded for the misdirection of the Judge, to give the plaintiff an opportunity of proving the

UTICA,
Aug. 1824.
Archibald
v.
Thomas.

UTICA,
Aug. 1824.
Archibald
v.
Thomas,

mistake of the scrivener. This he may do on the trial. (*Vid.* Cro. Car. 501. Bac. Ab. Usury, (K) 4, already cited; and Cro. Jac. 678.)

Curia, per WOODWORTH, J. This is an application for a new trial. The plaintiff commenced an action of debt on bond, dated 27th January, 1815, conditioned to pay \$3000, with interest, as follows: \$500, with interest on the whole sum, from the 1st day of October, 1815, on or before the 1st October, 1816; and \$500 more thereof, with interest on the whole sum unpaid, from the 1st day of October next, on or before the 1st October, 1817. The residue is payable in instalments of \$500 yearly in like manner. The case states, that the pleas, alleging the usury, adopted the language of the condition of the bond, to which the plaintiff filed a general replication. The counsel for the defendant contended that the facts pleaded were proven by reading the bond. No other evidence was introduced. The Judge directed the jury to find a verdict for the plaintiff.

Several questions were raised on the trial, not necessary to be stated. The question is, whether, on the preceding facts, the plaintiff was entitled to recover. The plea is not set out; but it is presumed to be in due form, averring a corrupt agreement to lend money, payable at the times, and with the interest specified in the condition of the bond; and that in pursuance of such corrupt agreement the bond was executed. The replication is not before us. It is stated to be general, and must be considered as putting in issue the allegation of usury.

If, by a sound construction of the bond, it reserves more than legal interest, then the usury is made out *prima facie*. For, without further proof, the reservation of unlawful interest will be considered as evidence of a corrupt agreement, which is the foundation of usurious contracts. But it was competent for the plaintiff, at the trial, to repel the *prima facie* evidence of a corrupt agreement, arising from the face of the bond, by showing, if in his power, that more than the rate of interest was reserved by mistake, and contrary to the intent of the party. This was done in *Nevison v. Whit-*

by, (*Cro. Car.* 501.) So also in *Bush v. Buckingham*, (2 *Ventris*, 83,) the agreement was to lend £50; and the scrivener, by mistake, drew a bond for more than legal interest, against the will and without the knowledge of the lender; yet he was held entitled to recover. In such case, it makes no difference whether the scrivener be in an error in fact or of law, as if the security bears a different construction in point of law from what the parties intended. Such mistake will not prejudice the lender, where his intention was incorrupt. (*Buckley v. Guildbank*, *Cro. Jac.* 677.)

UTICA,
Aug. 1824.
Archibald
v.
Thomas.

The remaining inquiry, then, is, what is the legal construction of the words used in the condition? The principal is payable in six yearly instalments of \$500 each, from the 1st October, 1815. It is contended that in all the instalments, payable after the first, interest is reserved from the 1st October, 1815. If the words of the bond require this construction, then more than legal interest is reserved. Thus, on the 1st October, 1817, the defendants were bound to pay \$500 principal, and interest on \$2000, the residue of the principal, for two years, although the interest for one of those years had been paid on the 1st October, 1816. A covenant to pay interest, generally, means the legal standard of interest, which is seven *per cent.* and consequently, on this construction, more than legal interest was reserved. If the condition is susceptible of a fair construction, not at variance with the statute, it is the duty of the Court so to construe it. They have the exclusive power of deciding whether a written contract be usurious. (*Levy v. Gadsby*, 3 *Cranch*, 180.) There is some obscurity in the words used. I think it highly probable the parties merely intended to secure the payment of interest annually on such parts of the principal as remained unpaid at the time each instalment became due. If interest is to be calculated from the 1st October, 1815, the consequence is, that, at the end of the second year, the plaintiff is entitled to interest at the rate of 14 *per cent.* for one year; at the end of the third year 21 *per cent.* and thus increasing annually, until the end of the last year, when, for the last \$500, 35 *per cent.* interest for one year might be demanded. However oppressive may be this premium for forbear-

UTICA,
 Aug. 1824.
 Archibald
 v.
 Thomas.

ance, or great the difficulty in assigning a cause for increasing the rate of interest each successive year, the Court cannot, on this ground, depart from the construction which the words of the condition import.

It is a well settled rule, in the interpretation of contracts, that when a clause is capable of two significations, it should be understood in that which will have some operation, rather than in that in which it will have none. (*Poth. on Obl. pt. 1, c. 1, s. 1, art. 7. 2 Com. on Con. 532.*)

If the word "unpaid" relates only to the principal money, then it is clear that interest is to be calculated at the end of every year from 1st October, 1815. But if, in the expression, "with interest on the whole sum unpaid," it has also reference to the interest as well as the principal, no more than legal interest would be reserved. The meaning of the sentence would, in that case, be, that \$500 was payable on the 1st October, 1817, together with the interest that accrued on the balance of principal, subsequent to the 1st October, 1815, and remained unpaid. I think the words will admit, and ought to receive this construction, rather than that urged by the defendants. I have little doubt it is conformable to the intention of the parties. But my opinion is placed on the ground, that where a contract admits of two significations, that ought to be adopted which renders it operative, rather than that which renders it null and void. If this conclusion be correct, the plaintiff was entitled to a verdict; if not, then the verdict ought to be set aside and a new trial granted.

I am of opinion that the motion for a new trial be denied.

Motion denied.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

JACKSON, *ex dem.* EDEN and others, *against* RATHBONE,
landlord, and GOULD, tenant, joint defendants.

In ejectment, the plaintiff recovered certain premises, situate in the city of *New-York*, particularly described in a special verdict found by the jury. The declaration was in the usual general form, for 5 acres, &c. in a certain ward of the city. Judgment having been entered for the plaintiff, an *habere facias possessionem* thereupon issued to the Sheriff of the city and county of *New-York*, who declined executing it, on account of the doubt which existed, whether any land, in possession of *Gould*, the tenant, with whom *Rathbone* had been admitted to defend, as landlord, was included in the description in the special verdict, he holding himself bound by this description.

In ejectment, where the declaration, verdict and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of *hab. fac. possessionem*, subject to be put right by the court, if he takes too much.

L. Mitchell, for the plaintiff, moved for a rule upon the Sheriff, requiring him to execute the *hab. fa. poss.* either according to the direction of the plaintiff's attorney, or to the extent of the description in the special verdict, which, as he contended, covered the premises of which the plaintiff sought to obtain possession. He produced an affidavit, shewing that the plaintiff's attorney had pointed out certain premises to the Sheriff, lying in the ward mentioned, which were in the tenant's possession when the suit was commenced, and of which the plaintiff claimed possession under the writ, and that an indemnity was offered to the Sheriff, &c. He also produced various affidavits, maps, &c. and a bill in Chancery, filed by one of the defendants, from which he contended that, upon a true location under the special verdict, the premises pointed out were included in it. But whether this were so or not, he contended that the Sheriff should have gone on according to the direction of the plaintiff's attorney. It is too late for the defendants to come in, after having pleaded and gone to trial, and say that the recovery is a nullity, because the tenant was not in possession of the subject matter of the ejectment. The proceedings in

But where the judgment is upon a special verdict, describing the premises, the plaintiff is confined to such location, in the first instance, and the sheriff may refuse to give him possession beyond it.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

this action are always general and indefinite. The particular premises in dispute are never designated in the declaration ; and where the defendant goes on without demanding a bill of particulars, there is no mode of reaching them, besides the one we have pursued. The general form gives notice to the tenant that we go for all the land he possesses in the ward referred to by the declaration. And where the landlord comes in, as here, he is bound to take notice, at his peril, of what his tenant defends for. The extent of his claim is measured by that of the tenant under whom he comes in ; and we have a right to take, under our execution, according to the possession of the tenant. It may be said, the special verdict controls and limits the generality of the count ; or, if it describes lands which are not in existence, that the plaintiff can take nothing under his judgment. Is this so ? If the verdict does not, in fact, embrace the premises, this must have arisen from mistake ; and, in this fictitious action of ejectment, the Court will rectify or overlook the mistake, and bring back the proceedings to the real point in dispute. They will mould them according to the truth of the case. The action of ejectment is a creature of the Court, and entirely under their control, for all the purposes of justice. The premises in question are understood, universally, to be those in possession of the defendant when the suit is commenced. In case of a judgment by default, they are identified by an affidavit of serving the declaration, and occupancy by the tenant. If he comes to defend, as here, he must plead not guilty—of what ? Of trespassing on the premises in question ; that is to say, *all the lands in his possession*. These are the very words of the consent rule in the English Common Pleas, as will appear from *Goodright v. Rich*, (7 T. R. 323.) It will be seen, from the opinions of *Ld. Kenyon*, Ch. J. and *Ashurst*, J. (*id.* 329, 330, *which he read*,) that under the more general consent rule of the K. B. and in this Court, the actual possession of the tenant, in the town or ward mentioned by the declaration, is the guide upon executing the writ of possession.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

The extent of the defendant's possession cannot be controlled by the verdict, though we admit that it may be by other considerations. The judgment is *for the term yet to come, of and in the premises aforesaid*—not the lands described by the verdict, but the declaration. The Sheriff must depend on the information of the plaintiff. We admit that he is entitled to an indemnity against any liability which he may incur by reason of the information being mistaken or false. This has been offered and declined. We do not wish the Sheriff to act without indemnity, either by a bond with sureties, or the advice and protection of the Court. "In this fictitious action," says *Ld. Mansfield*, in *Cottingham v. King*, (1 Burr. 629) "the plaintiff is to shew the Sheriff, and is to take possession at his peril of only what he has title to. If he takes more than he has recovered or shewn title to, the Court will, in a summary way, set it right." Again: in *Connor v. West*, (5 Burr. 2673) the same Judge remarks, that, "in truth and in fact, the Sheriff delivers possession at the shewing of the plaintiff, and at the peril of the plaintiff, who is, at his peril, to take possession of no more than he was entitled to. I remember an issue directed, to try whether the Sheriff had delivered possession properly, according to the recovery." In *Roe v. Dawson*, (3 Wils. 49) the ejectment was for $\frac{1}{2}$ of a cottage, and the Sheriff having delivered possession of the whole, the Court made a rule-upon him to re-deliver possession of $\frac{3}{4}$ to the defendant. In *Denn v. Purvis*, (1 Burr. 326) it was held that the plaintiff must take according to his title, though the declaration demand more. The judgment is, that the plaintiff recover his term in the whole premises, not merely a moiety, though the ejectment be against two defendants, and one of them die, after issue joined, but before trial. (*Farr v. Denn*, *id.* 362, and *vid.* 2 Sell. Pr. 121.) The case of *Jackson v. Van Bergen*, (1 John. Cas. 101) shews how little the verdict is to be regarded, in determining the extent of the possession to be taken. The verdict for the plaintiff was general for the whole premises, but the evidence on the trial related

UTICA,
Aug. 1824.

Jackson
v.
Rathbone,

only to an undivided moiety ; and the Court, on motion, restrained the execution to the latter.

G. Griffin & W. Slosson, contra, would not dispute the proposition that, in general, the Sheriff is bound to deliver possession to the plaintiff according to his directions ; but this is a prerogative of the plaintiff which the Court will watch with jealousy. Suppose a recovery, in fact, for but 300 feet in this city, but the plaintiff claims 10 acres ; would not the Court restrain him ? Has he a right to take possession, and put the defendant to a summary application to reclaim it ? One mode of restricting this right is, by proof at the trial. (*Brookes v. Baldwin, Barnes*, 468.) And such is the doctrine of *Jackson v. Van Bergen*, cited on the other side. There being a general verdict, the Court went to the evidence upon the trial to determine its application. When the verdict is special, there is no need of this. The result of all the proof on the trial is given by the verdict ; and where the premises are specifically described, as here, you cannot travel out of it. It is the finding of the jury, under the direction of the Court, and must be taken as undeniably true, between the parties, not only in the immediate suit, but in all others. It is, in itself, an estoppel upon both parties. Will it admit of question, that such a verdict cannot be overthrown by affidavit ? In *Roe v. Dawson*, cited for the plaintiff, the Court say, in terms, " the writ ought to have pursued the verdict ;" and, because it did not, the possession was restored. The verdict there was for $\frac{1}{2}$ only, and, *quoad hoc*, it was special. *Denn v. Purvis*, also cited for the plaintiff, maintains the same doctrine. It is denied that this judgment is on the special verdict, and insisted that it refers to the declaration. Is it meant by this, that the plaintiff will be entitled to take the whole 5 acres ? It is not pretended that the tenant was ever in possession to that extent. Then the declaration can be no guide. The jury say, they try the title to certain property marked upon the map which makes a part of their verdict ; and the Court are asked to execute that verdict upon other land, on the same map, which was not in the defendant's possession ; because the verdict is alleged to be inac-

curate, by *ex parte* affidavits. Are we to be ousted of our freehold in this manner? It has been long settled, that the rights of parties are not thus to be trifled with. (*Ex parte Reynolds*, 1 *Caines' Rep.* 500.) If the verdict cover nothing, the plaintiff cannot have execution at all.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

It is conceded, that the generality of the declaration may be restrained by the proof at the trial, and the extent of the defendant's possession—a *fortiori*, may it by the description in the special verdict. What is the object of the writ? It is to carry into effect the judgment of the Court alone. This judgment is rendered upon the description of the special verdict. You cannot go beyond this, even though the defendant may have admitted, in the clearest terms, that it was too narrow. You might as well send out execution for double the amount of a judgment in debt, because the defendant had admitted that, by mistake, the judgment was too small by one half. It is not enough to say, that the Court will correct the plaintiff if he grasps too much. They ought not to sit still and see an injury committed, because they have the power to redress it. Preventive justice is, in these cases, the most useful and important, and it accords with the course of the Court. Such was the case of *Jackson v. Van Bergen*, (1 *John. Cas.* 101 ; 7 *T. R.* 118, *note*, *S. P.*) The counsel examined the affidavits, maps, and other proofs before the Court upon the motion, as to the location of the special verdict, and contended that it covered nothing of which the tenant was in possession ; and that, therefore, the writ of possession could have no effect whatever. They concluded by citing the following additional authorities, as to the conclusive nature of a record and special verdict : *Witman v. Earl of Derby*, (1 *Wils.* 55) *Jenks v. Hallet*, (1 *Caines' Rep.* 64) *Taylor v. Horde*, (1 *Burr.* 114) *Crosswell v. Byrnes*, (9 *John. Rep.* 287) *Dunscombe v. Wingfield*, (*Hob.* 262) *Phil. Ev.* 2d *Am. ed.* 218 ; *Bradish v. Gee*, (*Ambl.* 229) *French v. Shotwell*, (5 *John. Ch. Rep.* 564)—and as to the extent of the plaintiff's right in taking possession upon the writ, 2 *Dunl. Pr.* 1048.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

E. Williams, in reply, confined himself to the questions, whether the location, according to the description in the special verdict, would include the premises of which the plaintiff sought to obtain possession. He examined the proofs before the Court, and contended that the plaintiff had attempted to take possession of no more than was covered by the special verdict.

The cause was argued in *May* term last, and remained under advisement to the present term, when,

WOODWORTH, J. delivered the opinion of the Court. He said the Court were with the counsel for the defendant, that, although upon a general declaration, and a verdict and judgment equally general, the plaintiff might take possession at his peril, subject to be put right by the Court if he took more than the premises in question upon the trial; yet, where there is a special verdict, as in this case, locating those premises, the parties and Sheriff should be guided by this. He then went at large into the facts, and added, that the Court had very carefully examined the questions which had been raised upon them, as to the location, and were satisfied that the directions by the attorney of the plaintiff, to the Sheriff, did not go beyond the description contained in the verdict, and that a rule must, therefore, be made upon the Sheriff, that he deliver possession pursuant to those directions.

Rule accordingly.

THE SAME *against* THE SAME.

The sheriff THE last cause having been removed by the defendant, on having erred a writ of error, to the Court of Errors, where the judgment upon the merits, in executing a writ of inquiry, under the 3d section of the act to prevent delays of execution, &c. (1 R. L. 143) the inquisition was set aside on motion.

But the Court refused to appoint elizors to execute the writ; though it appeared that both the sheriff and coroner were members of a corporation which was interested in, and had defended another cause, at the suit of the plaintiff in the writ of inquiry, that depended upon the same questions as those upon which the suit in which the writ issued were determined.

It seems, that upon such a writ of inquiry, the plaintiff is entitled to recover nominal damages, at all events; and that an inquest which finds for the defendant, will be set aside on that ground alone.

was affirmed, and the record remitted, &c. a writ of inquiry issued, and an inquisition was taken under the 3d section of the act (1 R. L. 143,) concerning writs of error, and to prevent delays of execution, before the Under Sheriff of the city and county of *New York*, on the 28th day of *April*, 1824. On the hearing, before the Under Sheriff and jury, all parol evidence of location was overruled and disregarded, except what related to the special verdict; and, on the ground that the description in the special verdict did not comprise any land in possession of *Gould*, at the commencement of the suit, the jury found for the defendant; and that the plaintiff had sustained no damages for mesne profits. The Sheriff and Coroner of *New-York* are members of the *Mechanics' Society*; and a suit brought by the same plaintiff, on the demises of the same lessors, against *Robert Chew*, at the time of the commencement of the suit, and now a tenant of the society, and an actual occupant under them, of the premises claimed in that action, had been defended at the expense of the society. This suit, together with several suits against the bank of *New-York* and their tenants, depend upon the same title, and were commenced at the same time.

UTICA,
Aug. 1824.

Jackson
v.
Rathbone.

Upon affidavits of these facts, *L. Mitchell & E. Williams* moved to set aside the inquisition, and that elizors be appointed to execute the writ. They made this motion before the Court had passed upon the motion in the last cause.

[WOODWORTH, J. suggested that the material question here would be disposed of by the decision upon that motion. If for the plaintiff, he must have his damages upon the writ of inquiry: otherwise, if for the defendant.]

Williams. Yes. But whatever be the fate of that motion, the inquest must be set aside. The plaintiff recovered something in the Court of Errors. Of this the record was conclusive evidence. The Sheriff and jury could not overrule or reverse the decision of that Court, and deny us all damages.

[WOODWORTH, J. True; this was an informality. You are entitled to nominal damages in any event.]

UTICA,
Aug. 1824.

Jackson
v.
Chew.

Mitchell said the authorities were plain for the appointment of elizors on account of the Sheriff's and Coroner's interest. And

Williams said, there is a difference between jury and executive process. Here the Sheriff or Coroner must act judicially, and a remote interest disqualifies him.

Clisbe, contra, insisted that the mere circumstance that the officer is a member of a corporation which is interested in opposing the plaintiff in another cause, though the question be the same, is too remote an interest, of itself, to disqualify him. No evidence of corruption or partiality is furnished. A Sheriff may execute his own process, if it be ministerial.

At another day, and when the Court came to decide the motion in the last cause, they said that it disposed of this motion to set aside the inquisition, which must be granted. But as to the motion for appointing elizors, they denied it; saying, that though the Sheriff had acted erroneously, he had not acted partially; that the objection of interest was so remote as not, of itself, to be a disqualification. It went merely to the favor of the officer; and the Court were to determine from the facts, whether it would so far influence him as to render the execution of the writ of inquiry by him unsafe for the plaintiff. They did not think so. Upon the evidence before them, they were satisfied that the error was one of judgment merely.

Rule accordingly.

THE SAME against ROBERT CHEW.

On judgment for plaintiff in ejectment, the sheriff and coroner being members of a corporation which claimed to own the premises in question, and had demised them to the defendant, and defended the action, at their own expense, through their tenant, the court appointed elizors to execute the writ of possession.

ELIZORS were appointed to execute the writ of possession in this cause, on affidavit of the facts detailed in the last

cause, touching the interest of the Sheriff and Coroner of New-York.

UTICA,
Aug. 1824.

A. Burr. for the motion, cited *Co. Litt.* 156, 157. *Bac. Abr. Sheriff, (M)*

Overseers of
Bridgewater
v.
Overseers of
Brookfield.

M. Ulshoeffer, contra.

The Court said the Sheriff and Coroner had a direct interest(a) in the execution of this process, and the motion must, therefore, be granted, without regard to the probable influence which it might have upon them.

Rule accordingly.

(a) Substantially they were parties to the cause. (*Wash. Ins. Co. v. Price*, 1 *Hopkins' Chancery Rep.* 1.)

THE OVERSEERS OF THE POOR of the town of *Bridgewater*,
against THE OVERSEERS OF THE POOR of the town of
Brookfield.

ON certiorari to the general sessions of *Madison* county. The purchase of an equitable interest in lands, and paying \$75, constitute a settlement; but this must be an indefeasible interest,
Zilpha Ward, a pauper, was removed, by an order of two justices, from the town of *Brookfield* to the town of *Bridgewater*, in *Madison* county; and on appeal to the sessions, they affirmed the order. *Brookfield* claimed that the pauper derived from a grantor having title.

A contract, by an administratrix, to convey lands of her intestate, when a surrogate's order for that purpose shall be obtained, does not vest such an interest, though an order be afterwards obtained.

Such a contract is void, and incapable of being enforced either at law or in equity, both because the administratrix has no interest, and as being contrary to the policy of the act authorizing administrators to sell the real estate of their intestate.

An administrator has no interest in, or control over the real estate of his intestate; and though after a contract to sell land when a surrogate's order shall be obtained for that purpose, an order be actually obtained, the administrator takes no beneficial interest, which can ensure to make the contract binding, even if it were not contrary to the policy of the law.

The cases which hold that where one conveys without title, and afterwards becomes owner, this shall ensure to the benefit of the grantee, mean that the grantor must acquire a beneficial interest in the premises sold, not a mere naked authority to sell.

UTICA,
Aug. 1824.

Overseers of
Bridgewater
v.

Overseers of
Brookfield.

per had acquired a derivative settlement, in *Bridgewater*, from her father, *J. B. Ward*; and the single question before the sessions was, whether *he* was settled there by virtue of an equitable estate, which *Brookfield* alleged he had acquired under a contract to purchase a farm of *Betsey Converse*. She had, as administratrix of *W. Converse*, deceased, executed a bond to *F. Stratton*, the condition of which, after reciting that her intestate was seized of the farm, that she, as administratrix, had sold it to *Stewart Bennet*, and received \$60, as a full compensation, and that *Bennet* had sold to *Stratton*, was, that, after she had obtained the requisite order from the Surrogate, she should sell and convey to *Stratton* in fee. This contract was assigned by *Stratton* to *J. B. Ward*; and afterwards by him to *Stewart Bennet*. *Ward* paid \$100 as the consideration of the assignment to him. The Surrogate afterwards made an order of sale; and the land was sold under it at public auction, to *Stewart Bennet*, the highest bidder, at \$60.

F. C. White, for the plaintiffs in error, contended that the father of the pauper did not acquire such an indefeasible equitable interest as was necessary, within the cases, to confer a settlement; and he cited and examined, *O. of Blenheim v. O. of Windham*, (11 *John. Rep.* 7) *O. of Schaghticoke v. O. of Brunswick*, (14 *John. Rep.* 199) *O. of Whites-town v. O. of Constable*, (*id.* 469) *O. of Augusta v. O. of Paris*, (16 *John. Rep.* 279) *O. of Pompey v. O. of Laurens*, (19 *John. Rep.* 238.) No specifick execution of such a contract as this would ever have been decreed by a Court of Equity. The obligor had no interest; but a mere naked contingent authority. Beside, the contract was contrary to the policy of the statute authorizing sales under an order of Surrogates. To say that the administratrix may bind herself to sell in this manner, would put down all competition at the auction required by law. The bond is void for this reason. (*Jones v. Caswell*, 3 *John. Cas.* 29. *Doolin v. Ward*, 6 *John. Rep.* 194. *Wilbur v. How*, 8 *John. Rep.* 444.)

J. A. Spencer & J. G. Stower, contra, cited *Jackson v. Stevens*, (13 *John. Rep.* 316.)

Curia, per SUTHERLAND, J. In *The Overseers of the Poor of the town of Whitestown v. The Overseers of the Poor of the town of Constable*, (14 John. 469) it was held, "that an indefeasible equitable interest, in land, was a purchase of an estate or interest, within the meaning of the 4th section of the act for the relief and settlement of the poor," (1 R. L. 280) and gave a settlement to the owner of it, in the town where the land lay, provided he actually paid for it the sum of \$75; and in *Augusta v. Paris*, (16 John. 281) *Spencer, J.* in delivering the opinion of the Court, says, "the statute contemplates two things—the ability of the purchaser to pay, and his actually paying \$75, in order that the payment shall acquire to the purchaser an estate or interest in lands." The money must not only be paid, but an indefeasible interest in land, either legal or equitable, must be actually acquired. If the vendor, therefore, has no title or interest in the land which he undertakes to sell, the vendee is not a purchaser, within the meaning of the statute, although he may have paid a full consideration for a good title. (*Blenheim v. Windham*, 11 John. Rep. 7.)

In this case, *Betsy Converse*, the administratrix of *W. Converse*, had no authority to sell the lands of her intestate, until the Surrogate made an order for that purpose. An administrator has no control over the lands of the intestate. His authority extends only to the personalty. If that is insufficient to pay the debts of the intestate, the statute directs the manner in which an order for the sale of a sufficient quantity of the real estate to pay the debts may be obtained. But, until such order is made, any contract which the administrator may make for the sale of the land, is utterly void, and incapable of being enforced, either at law or in Equity.

The doctrine, that where a person, having no title to land, conveys to another, and afterwards acquires a title to the same land, the subsequently acquired title shall enure to the benefit of his grantee, and the confirmation of his title, as established in *Jackson v. Stevens*, (13 John. 316, and the ca-

UTICA,
Aug. 1824.

Overseers of
Bridgewater
v.
Overseers of
Brookfield.

UTICA,
Aug. 1824.

Overseers of
Bridgewater
v.

Overseers of
Brookfield.

ses there cited,) is not applicable to a case like this. The administratrix never did acquire a beneficial interest in the land of her intestate. The Surrogate's order gave her merely a naked authority to sell ; and it would be against the policy of the law to permit the exercise of that authority to be influenced or controlled by any previous contract which she may have made. The sale, as finally made, gives the title, and can have no relation to any previous agreement. The bond of *Betsey Converse* to *Stratton*, by which she bound herself to give him a deed for the land, being absolutely void, the assignment of it to *Ward* passed no estate or interest in land, by which he acquired a settlement in the town of *Bridgewater*.

Order of Sessions reversed.

END OF AUGUST TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
SUPREME COURT
 OF THE
 STATE OF NEW-YORK,

IN OCTOBER TERM, 1824, IN THE FORTY-NINTH YEAR OF OUR INDE-
 PENDENCE.

ROWLEY against BALL.

ERROR, from the C. P. of the county of *Monroe*. The cause was originally commenced by *Rowley* against *Ball*, before a Justice of that county, who gave judgment against *Ball*, who appealed to the Common Pleas, where the cause was tried *January 10th, 1822*.

Rowley declared against *Ball* upon a promissory note given by the latter to one *William Huxley*, payable to him or bearer, for \$30, dated on or about the middle of *June, 1819*, and transferred to the plaintiff; and the declaration averred that the note had since been stolen, lost, or destroyed, or taken from the plaintiff without his consent or knowledge, Plea, the general issue.

Upon the trial, *J. D. Bailis* testified, that he had seen a note in *Rowley's* possession, purporting to have been given by *Ball*, for \$30, dated some time in *June, 1819*. The precise time when it was payable he could not tell; but recol-

An action at law cannot be sustained on a negotiable promissory note payable to bearer, by the holder, on his proving that the note was lost, though he shew that he lost it after it became due.

His only remedy is in a court of equity, which alone can afford the defendant adequate protection against future liability.

But if he shew that the note was, in fact, destroyed

he may recover in a court of law.

So, if the note be not negotiable, or if negotiable, and it appear not to have been negotiated.

What is sufficient proof of the execution of a lost note.

ALBANY,
October, 1824

Rowley
v.
Ball.

lected that it was payable to *William Huxley* or bearer, and when he saw the note, which was in *April*, 1821, it was due. It was admitted by *Rowley's* counsel, that *Ball* could neither read nor write, but signed by his mark; and that there was no subscribing witness to the note. *Rowley*, the appellee, swore, that he put the note into his pocket-book, and sometime after made diligent search for it, both in his pocket-book and desk, but could not find it; that the note was either lost, stolen, or destroyed; that he had reason to believe that the note had been taken from his pocket-book, and given to *Ball*; for the story of his having lost the note came to him from *Ball's*, before he knew or suspected the loss. On being cross-examined, he stated that it was first suggested to him that the note was lost by *Samuel Darling*, his own brother-in-law. *Hiram Huxley* swore that he came to *Ball's* in company with his brother, *John Huxley*, who told *Ball* that he had a note against him, which was given to *Wm. Huxley*. *Ball* replied, that whoever held the notes must pay for keeping *Wm. Huxley's* wife; but requested *John Huxley* to take a gun of him, and apply it on the notes; and it was agreed between them, that *J. Huxley* should take the gun upon trial, and, if he liked it, he should allow \$14 on the notes. If he did not like it, he was to return it. *John Huxley* testified, that he received of *Wm. Huxley* two notes against *Ball*, in the state of *Ohio*, one for \$30, and one for \$20, as they were read to him; that he could neither read nor write; that he went to *Ball's*, as stated by *H. Huxley*, in company with him, and told *Ball* that he had notes against him, which were given to *Wm. Huxley*, one for \$30 and one for \$20, and he answered, that whoever held the notes must pay him for keeping *Wm. Huxley's* wife. The witness requested *Ball* to pay him some money; but *Ball* said he could not. He then requested him to let the witness have some leather; but *Ball* answered, that he had none to spare. The conversation then followed about the gun, as stated by *H. Huxley*. The witness took the gun, but afterwards returned it, and sold the \$30 note to one *Clarke*.

The counsel for *Ball* insisted, that he ought not to be put upon his defence, till *Rowley* had proved the actual destruc-

tion of the note. The counsel for *Rowley* insisted, that there was already sufficient evidence of the destruction of the note, or, at least, sufficient to entitle him to go to the jury, upon the ground that he had proved the loss of the note after it fell due. This was opposed by *Ball's* counsel; and,

ALBANY,
October, 1824.

Rowley
v.
Ball.

The Judges gave their opinion, that the several matters proved and given in evidence, were not sufficient to entitle *Rowley's* counsel to go to the jury, inasmuch as an actual destruction of the note had not been proved; that *Rowley* could not recover on a negotiable note, although it was lost after it became due, unless this was followed by proof of its destruction; and gave judgment of nonsuit. To this opinion, *Rowley's* counsel excepted; and the cause came to this Court upon a bill of exceptions, containing the above matters.

A Samson, for the plaintiff in error, briefly stated the case, and cited *Pintard v. Tackington*, (10 John. Rep. 104) *Chit. on Bills*, Phil. ed. 202; *Marius on Bills*, 19; *Maxwell on Bills*, 136; *Meeker v. Jackson*, (3 Yeates' Rep. 442) 2 *Campb. Rep.* 214, note to *Pierson v. Hutchinson*; *Fresman v. Boynton*, (7 Mass. Rep. 483, 486, per Parker, J.) *Brown v. Messiter*, (3 M. & S. 281) *Anderson v. Robson*, (2 Bay's Rep. 495.) These authorities, he said, supported the position that an action may be sustained on a lost note, though negotiable, if lost when over due.

At any rate, the Court below erred in not suffering the plaintiff below to go to the jury, upon the presumption afforded by the circumstances, that the note had been, in fact, destroyed.

J. Dickson, contra. The only real question in the Court of Common Pleas was, whether the appellee had a right to go to the jury; though the Court may have given reasons which are not strictly confined to that point. Nor does it appear that the grounds taken by the Court were the only foundation of the nonsuit. There might have been other objections; and, if they appear upon the case, we certainly

ALBANY,
October, 1824.

Rowley
v.
Ball.

have a right to insist upon them, though the Court may have stopped short, and deemed the reasons actually given sufficient. In truth, the Court will perceive that there were other and important reasons. In the first place, the evidence of the execution of the note was altogether insufficient. So was the proof that it had ever been transferred to the plaintiff. (*Shaver v. Ehle*, 16 John. 201.) And more than this, *J. Huxley*, who transferred the note to *Clarke*, was interested. (*id.*) Both these considerations might have entered into the decision given by the Common Pleas; and, at any rate, we have a right to the benefit of them here.

No action, however, will lie on a promissory negotiable note, lost, but not destroyed. If the note were lost before it fell due, there could be no question on the subject; and we contend that its being due can make no difference. True, in an old edition of *Chitty*, it is said that an action will lie in the latter case; and the same remark is repeated in the *Philadelphia* edition; but that author refers to cases in its support, which have been overruled. (*Chit. on Bills*, 195 to 205, *Phil. ed.*) He is overruled by *Pierson v. Hutchinson*, (2 *Campb. Rep.* 211. 6 *Esp. Rep.* 126. S. C.) *Mayor v. Johnson*, (3 *Campb. Rep.* 324; and *vid. Bayley*. 169. *Chit. on Bills*, *Phil. ed.* 484-5.) The case of *Davis v. Dodd*, (4 *Taunt.* 602.) is also against this action; and *Poole v. Smith*, (*Holt's N. P. Rep.* 144,) is in point. The bill there was lost after it was due, from the pocket of the attorney's clerk, a few days only before the trial; and the action was fully sustained by all the requisite proof; yet, as the bill was negotiable; and did not appear to have been destroyed, the plaintiff was nonsuited. This case is also sustained by several authorities cited in a note, (*id.* 145.)

But suppose the action will lie, it cannot be sustained without a previous offer of an indemnity against the note. That the note was due, and, therefore, subject to all the equities between the original parties, or that an action upon it is defeasible by the defendant's proving the loss, are neither of them sufficient answers to this objection. *Chitty*, (*vid. Phil. ed.* 197, 200) lays down his doctrine with this qualification, in relation to a note transferable by delivery, though it be lost when over due.

But, in any event, we say, the remedy is in Equity alone ; and should, from the very nature of the subject, be confined exclusively to the Court of Chancery. It is so upon authority ; for, most obviously, Equity would not relieve, if a remedy could be had at law. This is the distinction upon which a Court of Chancery rests its jurisdiction. The following authorities sustain both these positions. (*Walmsley v. Child*, 1 *Ves. Sen.* 341. 1 *Fonb. Eq.* 17. *Ex parte Greenway*, 6 *Ves. Jun.* 812.) In the last case, speaking of the very point under consideration, the Ld. Chancellor says, "There must be a complete indemnity going to all the consequences against the holder, if the bill has not been paid ; and against any demand that may be made by future possible holders, if it should have been paid. When I was Ch. Justice, I tried an action in the Common Pleas, upon a bill alleged to be lost ; which had been previously lost by the payee. An indemnity was offered by bond, but I nonsuited the plaintiff. The counsel objected strongly upon the offer of indemnity ; and it came before the Court upon a motion for a new trial ; and there was a long discussion upon the nature of these indemnities in a Court of Law. The Court had not come to a decision upon it when I left them ; and I do not know the result. But I could never understand by what authority Courts of Law compelled parties to take the indemnity." The course of practice, on trials at law, will demonstrate the importance of the Ld. Chancellor's remark, that a most full and complete indemnity should be given ; which can be effected under the direction of a Court of Equity only. Although the note were negotiated never so long after it is due, all the plaintiff is bound to prove at the trial, is the existence and loss of the note, and that he was the holder. The burthen of shewing when the note was transferred, in order to let in the defence, lies with the defendant. Till the contrary is shewn, the legal intendment would be that the note was transferred before it fell due, in the fair course of trade ; and that the plaintiff is a *bona fide* holder. Both the hazard and expense of such testimony should fall on the one who is in fault, the loser of the note. This is one of the consequences of the loss against which, in the language

ALBANY,
October, 1824.

Rowley
v.
Ball.

ALBANY,
October, 1824.

Rowley
v.
Ball.

of the Ld. Chancellor, the party should be indemnified. A Court of Law is not so constituted as to be able to afford such a protection. Their course of proceeding is opposed to it. Chancery alone is a competent forum. The powers of that Court are more ample, and alone can give full and adequate relief. But, at any rate, whether the question belongs to this or the other side of the hall, indemnity must, in all cases, be given. In the principal case, it has not been even offered or intimated.

It is said, this Court have already settled the question against us; but no case goes so far. In *Pintard v. Tackington*, (10 John. 104,) it did not appear that the note was negotiable; and the Court expressly recognize the authority of *Pierson v. Hutchinson*, and *Ex parte Greenway*, upon which we rely; and by which the action was denied upon lost negotiable paper. *Meeker v. Jackson*, (3 Yeates' Rep. 442,) was not the case of a negotiable note. But, if otherwise, it has no application here. The state of *Pennsylvania* has properly no Court of Chancery, and the Supreme Court of Law has been driven to the necessity of exercising equitable powers. This is sanctioned by a law of that state; and the decision cited was the offspring of this mixed authority. *Brown v. Messiter*, (3 M. & S. 281,) passed *ex parte*, on a rule to shew cause, which was made absolute before a single Judge, without looking into the authorities. All that *Freeman v. Boynton*, (7 Mass. Rep. 486,) contains on this head, is a dictum of Mr. Justice *Parker*, remarking that a lost note may be made good by indemnity; without saying that it would be so of a negotiable note, or whether the indemnity is to be taken by a Court of Law or Equity. In *Anderson v. Robson*, (2 Bay, 495) also, it did not appear that the bill was negotiable, nor was any question made as to the jurisdiction of the Court. The only question was, whether the proof of loss was sufficient.

Samson, in reply. The gentleman has no right to examine questions here, which were not made in the Court below. The discussion should be confined to the points distinctly made upon the face of the bill of exceptions; and cannot be

extended to the whole merits of the case, either as it appears from the facts in the bill, or might possibly have existed in the Common Pleas. The case was there put upon the ground, alone, that an action is not maintainable upon a lost note, but that this must be followed by evidence that the note was, in fact, destroyed. Such were the points embraced by the application for a non-suit; and such the points decided by the Court. We hear not a syllable of indemnity. No objection was made on account of its absence. And if such a difficulty had been started, *non constat*, but it would have been immediately obviated by the proof; or the requisite indemnity produced and given upon the spot. It is sufficient, if it be tendered or given upon the trial.

All the elementary writers agree that an action is maintainable upon a lost promissory note, though it be negotiable; and it is using too broad a language, to say that the English decisions are opposed to this. In all the cases (with the exception of *Poole v. Smith*,) where the action has been denied the note was lost before it fell due, though perhaps that fact does not expressly appear in the report. In *Pierson v. Hutchinson*, the plaintiff was non-suited because the destruction of the note did not appear in proof; and the reason assigned by *Ld. Ellenborough*, in conclusion, is, that the defendant might be compelled to pay the bill a second time. This remark implies that the bill was, in fact, lost before it fell due; otherwise there would have been no possible obligation to pay. *Poole v. Smith*, decided at *nisi prius*, I venture to say, is the only case where a recovery was ever denied upon a bill or note lost when over due. In that case, the bill had been drawn more than 6 years before the trial; and the proof was wretchedly defective that there was a subsisting debt upon the bill. All the proof of the demand upon the trial was, that it had been shewn to the acceptor after the action was brought, who admitted the acceptance to be his hand writing, but said he was under no obligation to pay, in as much as, between him and the drawer, it had been satisfied by other bills. The Ch. Justice, upon this proof coming out, remarked, generally, that this evidence was not

ALBANY,
October, 1824.

Rowley
v.
Ball.

ALBANY,
October, 1824.

Rowley
v.
Ball.

enough without producing the bill ; but upon the matter being pressed by the plaintiff's counsel, he concludes, " Upon the ground of the non-production of the bill, I think I am called upon to non-suit the plaintiff. The rule is an extremely salutary one, and ought not to be relaxed." It is evident that this case depended on its own special circumstances. The demand was a stale one ; which fortified the defendant's declaration on its being presented, that it had been paid. There was enough, independent of the loss, to show that the plaintiff should be non-suited. In *Powell v. Roche*, (6 *Esp. Rep.* 76,) it was held enough, either to produce the note or shew it to be lost. In *Davis v. Dodd*, the prominent question was as to the form of the action ; and whether the plaintiff should not have gone upon the promise to give a new bill. The Court, to be sure, intimate that no action will lie ; but the remark, as to this, deserves no greater weight than the merest *obiter dictum*.

It is true, as remarked, that Courts of Equity give relief ; and, on compelling the payment of a lost bill or note, they require an indemnity from the complainant ; but this power to take an indemnity is not, as supposed, the source of their jurisdiction. A paper has been lost through accident, which is a very usual and broad ground of going into a Court of Chancery ; but it was never denied that a Court of Law have a concurrent jurisdiction in such cases, provided the truth can be reached without the aid of the defendant's oath. This generally becomes necessary in case of loss ; and when the cause is once in a Court of Chancery, it requires an indemnity as an incidental means of making all parties secure. The question of indemnity is one of form merely ; and depends upon the different manner in which the Courts are organized, and their different course of proceeding. In the case before the Court, no indemnity has ever been required. A recovery would forever conclude against any future action upon this note. The possibility that the maker may not be able to make out a defence on the ground of that recovery, would be equally an objection to maintaining any action for any cause, and especially upon negotiable paper. In all cases, the defendant runs the hazard that the plaintiff

may not be an honest holder; and, if so, the first recovery will not avail him against a second. The loss merely varies the mode of getting this link into the chain of proof. *Pier-son v. Hutchinson* is in point, that a Court of Law have no power to exact an indemnity. If the defendant insists upon one, *he* must go into Chancery himself, provided the plaintiff refuses to give it.

ALBANY,
October, 1824.

Rowley
v.
Ball.

[WOODWORTH, J. It certainly cannot be necessary to pursue the question of indemnity. The defendant should have put himself upon this defect in the Court below.]

[SUTHERLAND, J. It strikes me that the only objection made below, and, of course, the only one which the defendant can properly take here, is, that the action was not sustainable, because the actual destruction of the note was not proved.]

Samson. I would then only add, that, to turn the party out of Court, upon the ground that he should have gone to a Court of Equity, would be to deny him all remedy. On filing his bill, he would be told, in the uniform and settled language of the Court of Chancery, that it is beneath the dignity of that Court to interfere in a matter of \$30. Such has been the decision of that Court, and such it will of course be again, unless an exception arises, and our reception is to be more favorable on the other side of the hall, from the circumstance of our being sent there by this Court.(a)

Curia, per WOODWORTH, J. No exception was taken to the proof given as to the execution of the note. Were it necessary, however, to express an opinion, I should consider the evidence, *prima facie*, sufficient. The witness stated to the defendant that he held two notes against him, given to *William Huxley*; one for \$30, the other for \$20. The defendant, in reply, admitted the notes, and offered to make part payment. The identity of the note to which the confession related, is established with reasonable certainty.

(a) *Vid. Mitchell v. Tighe*, 1 *Hopkins' Chancery Rep.* 119. *Vredenberg v. Johnson*, *id.* 112.

ALBANY,
October, 1824.

Rowley
v.
Ball,

The case of *Shaver v. Ehle*, (16 John. 201) is clearly distinguishable from the present.

The remaining question is, whether an action at law can be sustained on a negotiable promissory note, payable to bearer, by a person who was the holder, on his proving that the note was lost.

If the note had not been negotiable, or, if negotiable, had not, in fact, been negotiated, the plaintiff would be entitled to recover. (*Pintard v. Tackington*, 10 John. 104.) The cases which have not permitted a recovery at law upon negotiable paper lost, but not destroyed, were those in which the paper had been endorsed before it was lost. (*Pierson v. Hutchinson*, 2 Campb. Rep. 211. *Ex parte Greenway*, 6 Ves. 812.) In this case, the note being payable to bearer, the holder could make out, *prima facie*, a cause of action, and although the note was due at the time it was lost, the maker would be exposed to the hazard of shewing that fact by legal evidence. It would, therefore, seem to be a hard doctrine, which should place the maker in this situation, without requiring an indemnity. In such cases, it is better to leave the party to his remedy in Equity, where a suitable indemnity will be provided against any subsequent recovery. This subject peculiarly belongs to Equity jurisdiction. In *Ex parte Greenway*, *Ld. Eldon* observes, "I never could understand by what authority Courts of law compelled parties to take the indemnity." In *Pierson v. Hutchinson*, *Ld. Ellenborough* held, that whether an indemnity be sufficient or insufficient, is a question of which a Court of law cannot judge; and although there are *dicta*, that, upon the offer of an indemnity, the endorsee of a lost bill may recover at law, they are so contrary to the principles upon which the judicial system rests, he could not venture to proceed upon them. *Chitty*, in his treatise on bills, p. 173, ed. of 1817, is of opinion, that where the bill has been lost after it became due, there is no reason why the person who lost it should not be permitted to proceed at law, without offering an indemnity, inasmuch as the law would, in such case, secure all the parties to the bill against future liability to a person who becomes the holder of it after it falls due. This is undoubted-

ly correct, provided the maker of the note, or acceptor of the bill, could prove that it came to the hands of the holder after due. If, in the present case, the plaintiff recovers against the defendant, and subsequently a suit is commenced on the note by another, claiming to be a *bona fide* holder, the recovery had would not alone be a sufficient defence. The defendant must also prove the fact, that it was due when it was lost by the present plaintiff. If he could not, then the subsequent holder would recover, on the ground that it did not appear he received the note after it became due.

It is not necessary that the plaintiff should have a remedy at law in such a case. His redress is ample in Equity, where the defendant can be protected against subsequent liability. I have not found any adjudged case on this precise point; but, from the reason of the thing, and the analogy to cases where notes have been lost after they were endorsed, I think the action cannot be sustained, without proving that the note was destroyed.

Judgment affirmed.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

M'CLURE, late Sheriff of STEUBEN, against ERWIN and others.

PLACITA of October term, 1822. *Memorandum of January term, 1822. Steuben County, ss. George M'Clure, late Sheriff of the county of Steuben, plaintiff in this suit, complains of Francis Erwin, John Knox and Eldad Mead, defendants in this suit, in custody, &c. of a plea that they render to him \$5000, of debt, which they owe to and unjustly detain from him, for this, to wit, that whereas the said Francis, John & Eldad, and one Benjamin Parker, in his life time, now deceased, and whom the said Francis, John & Eldad have survived, heretofore, to wit, on the 26th day of March, A. D. 1816, at, &c. by their certain writing, obligatory, sealed, &c. and to the Court, &c. the date whereof, &c. acknowledged themselves to be held and firmly bound unto*

First count of narr. on bond from gaoler, and his sureties, debts to the sheriff, pluff.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

stating condi-
tion, that if the
former execu-
ted his trust,
and would not
suffer any pris-
oners to es-
cape, then, &c.

averring that
O. S. T. was
committed to
gaol on ca. ss.
at the suit of
O. H. and gaol-
er negligently
suffered him to
escape,

the said plaintiff, Sheriff of the county of *Steuben*, in the sum above demanded, to be paid, &c. when they, the said *Benjamin*, &c. should be thereunto afterwards requested; which said writing obligatory was and is subject to a certain condition, thereunder written, to the effect following, to wit: Whereas the above bound *Benjamin Parker* was appointed to the office of gaoler, or gaol-keeper, of the said county of *Steuben*, on the said day of *March*, in the year aforesaid; therefore, the condition of the said above obligation was such, that if the said *Benjamin* should well and faithfully, in all things, perform and execute the trust reposed in him as gaoler of the county aforesaid, during his continuance in the said office by virtue of the said appointment, faithfully, without fraud, deceit, or oppression, and would not, at any time, suffer any prisoners committed to his charge to escape from said prison, through his neglect, until legally discharged, then the said obligation to be void, else to remain in full force and virtue. And the said plaintiff avers, that one *Olney S. Thatcher*, afterwards, to wit, on the 24th day of *March*, *A. D.* 1817, at, &c. was committed to the gaol of the said county of *Steuben*, he, the said *Benjamin*, then being gaoler as aforesaid, under and by virtue of the said appointment, in the said writing obligatory mentioned, on a *capias ad satisfaciendum*, directed to the Sheriff of the said county of *Steuben*, and delivered to the said *George M'Clure*, then being Sheriff of the said county of *Steuben*, issued out of the Supreme Court of Judicature of the state of *New-York*, at the suit of one *Olney Hines*, tested on the 1st Monday of *January*, *A. D.* 1817, and returnable on the 1st Monday of *May*, in the year last aforesaid, for the sum of \$84,07, with directions endorsed thereon, to receive the said sum of \$84,07, with interest from the 20th of *August*, 1815, besides Sheriff's fees. And the said plaintiff further avers, that after the said *Olney S. Thatcher*, otherwise called *Samuel O. Thatcher*, was committed to the gaol of the said county of *Steuben*, as aforesaid, he the said *Benjamin* being such gaoler as aforesaid, the said *Benjamin*, in his life time, afterwards, to wit, on the 1st day of *June*, *A. D.* 1817, at, &c. negligently suffered and permitted the said *Olney S. Thatcher*, otherwise

called *Samuel O. Thatcher*, he, the said, &c. then not being legally discharged, to escape and go at large wheresoever he would, out of the gaol of the said county, he the said *Benjamin* being such gaoler as aforesaid, under and by virtue of the said appointment in the said writing obligatory mentioned, he the said plaintiff having been, during all the time aforesaid, Sheriff of the said county of *Steuben*; by means of which said premises, the said plaintiff hath sustained damages to a large amount, to wit, to the amount of \$5000, whereby an action hath accrued, &c.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

whereby the
pltf. sustained
damages to
\$5000.

Second count, setting forth another bond, commitment and escape as in the first count, and adding—"by means of which said last mentioned negligence of the said *Benjamin*, as such gaoler as aforesaid, in suffering and permitting the said *Olney S. Thatcher*, otherwise, &c. to escape and go at large out of the said last mentioned gaol, and out of the charge and custody of him the said *Benjamin*, as such gaoler as last aforesaid, the said *Olney Hines*, afterwards, to wit, in the term of *January, A. D. 1819*, in the Court of Common Pleas in the said county of *Steuben*, before the Judges of the same Court, then and now being held at, &c. levied his certain plaint in a plea of debt against the said plaintiff, as such Sheriff as aforesaid, for the same identical escape last mentioned, of the said *Olney S. Thatcher*, otherwise, &c. from the gaol of the said county of *Steuben*, and from and out of the charge and custody of the said *Benjamin*, as such gaoler as aforesaid; and such proceedings were thereupon had, in the said Court of Common Pleas, before the aforesaid Judges thereof, that afterwards, to wit, in the term of *February*, of the said Court of Common Pleas, *A. D. 1820*, it was considered and adjudged by the said Court, before the aforesaid Judges thereof, that the said *Olney Hines* should recover against the said plaintiff \$84,07, of debt, and also \$25,49, for the damages which the said *Olney Hines* had sustained, on occasion of the detaining that debt, over and above his costs and charges, by him the said *Olney Hines* about his suit in that behalf expended, and for those costs and charges \$27, 85, whereof the said plaintiff is convicted, as by the record and proceedings, &c. (*averring the escape from the gaol of*

Second count
the same;
averring also a
suit against
the sheriff for
the escape, and
judgment a-
gainst him;
and

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

Notice to the
dfts. of the
pendency of
that suit,

whereby the
plaintiff had
sustained dam-
ages to \$5000.

Steuben, and the escape for which the recovery was had, to be the same.) And the said plaintiff further avers, that after the commencement of the aforesaid suit against him the said plaintiff, by the said *Olney Hines*, for the said last mentioned escape of the said *Olney S. Thatcher*, otherwise, &c. from the said gaol as aforesaid, and before the giving of the said judgment by the said Court of Common Pleas, in favour of the said *Olney Hines*, against the said plaintiff, for the said last mentioned escape of the said *Olney S. Thatcher*, otherwise, &c. as aforesaid, to wit, on the 1st day of January, A. D. 1820, at, &c. the said *Francis, John & Eldad*, survivors as aforesaid, there had notice of the said suit which was so commenced as aforesaid, by the said *Olney Hines* against the said plaintiff, for the said last mentioned escape of the said *Olney S. Thatcher*, otherwise, &c. from the said gaol as aforesaid. By means of all which said last mentioned premises, in this count mentioned, the said plaintiff hath sustained damages to a large amount, to wit, the amount of \$5000, whereby an action hath accrued, &c."

Imparlance to October term, 1822.

Pleas to first count, 1. That gaoler did not permit O. S. T. to escape. 2. That O. S. T. was not committed, and issue to the country on both pleas.

3. That O. H. plaintiff in the *ca. sa.* permitted O. S. T. to escape, concluding with a verification ;

Pleas to the first count : 1. That the said Benjamin Parker did not suffer and permit the said Olney S. Thatcher to escape, and go at large wheresoever he would, out of the said gaol of the said county of Steuben, (concluding to the country.)

2. That the said *Olney S. Thatcher* was not committed to the said gaol, whilst he the said *Benjamin* was the gaoler thereof, (concluding to the country.)

3. That, at the said time when the said *Benjamin* is supposed to have suffered and permitted the said *Olney S. Thatcher* to escape, and go at large out of the said gaol, the said *Olney Hines* did permit and suffer the said *Olney S. Thatcher* to escape, and go at large out of said gaol wheresoever he would ; and which is the same going at large out of the said gaol in the said first count mentioned, (concluding with a verification and prayer of judgment, &c.

4. That the said *Olney Hines* did not, at any time within one year from the time of the said escape of the said *Olney S. Thatcher*, in the said first count mentioned, bring or commence any action against him the said *George*, for the said escape; and that the said *George* did not, at any time, within the said year, sustain any damage by reason, or on account of the said escape, (*concluding with a verification, and prayer of judgment, &c.*)

Pleas to the second count. 1. That the said *Benjamin* did not suffer and permit the said *Olney S. Thatcher* to escape, and go at large, as in that count is alleged; and further, that the said *Francis, John & Eldad* had not, nor had either of them, at any time after the commencement of the said suit by the said *Olney Hines* against the said *George*, and before the giving of the said judgment therein notice of the pendency of the said suit; (*concluding with a verification and prayer of judgment, &c.*)

2. That the said *Olney S. Thatcher* was not committed to the said gaol whilst he the said *Benjamin* was gaoler thereof; and that the said *Francis, John & Eldad* had not, nor had either of them, at any time after the commencement of the said suit by the said *Olney Hines* against the said *George*, and before the giving of the said judgment therein, notice of the pendency of the said suit, (*concluding with a verification, and prayer of judgment, &c.*)

3. That at the said time when the said *Benjamin*, in the said second count is supposed to have suffered the said *Olney S. Thatcher* to escape and go at large out of the said gaol, the said *Olney Hines* did permit and suffer the said *Olney S. Thatcher* to go at large out of the said gaol wheresoever he would, and which is the same going at large out of the said gaol in the said 2d count mentioned; that the said *Francis, John & Eldad* had not, nor had either of them, at any time after the commencement of the said suit, by the said *Olney Hines*, against the said *George*, and before the giving the said judgment therein, notice of the pendency of the said suit, (*concluding with a verification, and prayer of judgment, &c.*)

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

4. That *O. H.* did not sue the sheriff within one year after escape; and that the sheriff sustained no damage from the escape within the year, concluding with a verification.

Pleas to the second count.
1. No escape, and that defendants had no notice of suit pending, concluding with a verification.

2. No commitment; and no notice of suit pending, with the like conclusion.

3 That *O. H.* permitted the escape; and no notice of suit pending, with the like conclusion.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

4. That O. H. did not sue sheriff in one year from time of escape, no notice of suit pending; and that sheriff neglected to avail himself of statute of limitation, with the like conclusion.

Replications
to the 3d plea
to 1st count,
and issue to
the country;

To 4th plea
to 1st count,
judgment a-
gainst the
sheriff for the
escape, and no-
tice to dfts. of
the suit pend-
ing, conclu-
ding with a
verification;

4. That the said *Olney Hines* did not, at any time within one year from the time of the said escape of the said *Olney S. Thatcher*, in the said 2d count mentioned, bring or commence any action against the said *George*, for the said escape last mentioned; and that the said *Francis, John & Eldad*, had not, nor had either of them, at any time after the commencement of the suit by the said *Olney Hines* against the said *George*, and before the giving of the said judgment therein, notice of the pendency of the said suit; that the said *George* did not plead to the said suit, or give in evidence at the trial thereof, that the same was not commenced in one year from the said escape in the 2d count mentioned as aforesaid; but wholly neglected so to do; and so the said *Francis, &c.* say that the said recovery was had by the said *Olney Hines* against the said *George* in his own wrong, and by his own default, (concluding with a verification, and prayer of judgment, &c.)

Replications relative to the first count. 1. To the 3d plea to the 1st count: That the said *Olney Hines* did not permit and suffer the said *Olney S. Thatcher* to escape and go at large out of the said gaol, in the said 1st count mentioned, wheresoever he would, in manner and form as the said *Francis, John & Eldad*, survivors as aforesaid, have, in their said plea to the said 1st count of the said declaration of him the said *George* alleged, (concluding to the country.)

2. To the 4th plea to the 1st count: That after the said escape of the said *Olney S. Thatcher*, in the said 1st count mentioned, to wit, in the term of *January, A. D. 1819*, of the Court of Common Pleas, in the said county of *Steuben*, before the Judges of the same Court, then, and now being held at, &c. the said *Olney Hines* levied his certain plaint, in a plea of debt, against the said *George*, as such Sheriff as aforesaid, for the same identical escape of the said *Olney S. Thatcher*, from the gaol of the said county of *Steuben*, and from and out of the charge and custody of the said *Benjamin*, as such gaoler as aforesaid in the said 1st count mentioned; and such proceedings were thereupon had in the said Court of Common Pleas, before the aforesaid Judges thereof, that afterwards, to wit, in the term of *February*, in the said Court

of Common Pleas, A. D. 1820, it was considered and adjudged by the said Court before the aforesaid Judges thereof, that the said *Olney Hines* should recover against the said *George*, in the said plea, \$84,07 of debt, and also \$25,49 for the damages which he the said *Olney Hines* had sustained on occasion of the detaining that debt, over and above his costs and charges by him the said *Olney Hines* about his suit in that behalf expended, and for those costs and charges, \$27,85, &c. whereof the said *George* is convicted, &c. as by the record and proceedings, &c.; and the said *George* further says, that he was obliged to pay, lay out and expend, and necessarily did pay, lay out and expend a large sum of money, to wit, the sum of \$50, in and about his defence in the said suit so prosecuted against him by the said *Olney Hines* for the said escape of the said *Olney S. Thatcher*, to wit, on, &c. at, &c. (*averring the escape from gaol, and the escape for which the recovery was had were the same.*) That after the commencement of the last aforesaid suit against him the said *George* by the said *Olney Hines*, for the said escape of the said *Olney S. Thatcher* from the said gaol as aforesaid, in the said 1st count mentioned, and before the giving of the said last mentioned judgment by the said Court of Common Pleas in favor of the said *Olney Hines* against the said *George* for the said escape in the said 1st count mentioned as aforesaid, to wit, on the 1st day of *January*, A. D. 1820, at, &c. the said *Francis*, &c. survivors, &c. there had notice of the said suit, &c. which said suit was then depending in the said Court of Common Pleas, and undetermined as aforesaid, (*concluding with a verification, and prayer of judgment, &c.*)

Replication concerning the second count, to the 3d plea to that count; that they the said *Francis*, &c. survivors as aforesaid, after the commencement of the said suit by the said *Olney Hines* against the said *George* for the escape of the said *Olney S. Thatcher*, in the said 2d count of the said declaration of him the said *George* mentioned, and before the giving of the said judgment therein, had notice of the pendency of the said suit, in manner and form as he the said *George* hath in the said 2d count of the said declaration of

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

To 3d plea
to 2d count,
and issue to
the country.

ALBANY,
October, 1824.

McClure
v.
Erwin.

him the said *George*, in that behalf alleged, (*concluding to the country.*)

Demurrers concerning the *second* count: to the 1st, 2d and 4th pleas to that count, assigning for causes, as to the 1st and 2d pleas, that they deny the matters contained in that count, making complete issues, without setting forth any new matter whatever, and yet conclude with a verification; whereas they should have concluded to the country; and assigning for cause, as to the 4th plea, that it is double in alleging that no suit was commenced within the year, &c. and also that the plaintiff neglected to plead that fact on the trial in the Common Pleas, and also that the defendants had no notice of the suit, &c. *Joinder* in demurrer.

Rejoinder to replication to 4th plea to 1st count, denying notice of the suit pending; and averring that it was defended without defendant's knowledge; that the sheriff neglected to avail himself of statute of limitation.

On special demurrers to the 1st, 2d and 4th pleas to the 2d count, and to the rejoinder to the replication to the 4th plea to the 1st count, held, that the rejoinder was not double, within the rule which denies the right to include two distinct and independent matters, requiring two separate answers, in the same pleading;

REJOINDER concerning the *first* count to the replication to the 4th plea. That the defendants had not, nor had either of them, at any time after the commencement of the said suit by the said *Olney Hines* against the said *George*, in the said replication mentioned, and before the said judgment therein, any notice of the said suit; and that the said *George* defended the said suit without the privity or knowledge of them the said defendants, or either of them; also that the said *George* in so as aforesaid defending the said suit, wholly omitted and neglected to plead thereto, or to give in evidence, or insist, upon the trial thereof, that the said suit was not brought or commenced against him, the said *George*, within one year from the time of the said escape in the said first count mentioned; and so the said *Francis*, &c. say that the said judgment against the said *George*, in the said replication mentioned, was recovered against him the said *George* by his own neglect and default. (*concluding with a verification, and prayer of judgment, &c.*)

DEMURRER to this rejoinder, assigning for cause, that it is double in denying notice of the suit, also in alleging that it was defended without the privity, &c. of the defendants; also in alleging that the plaintiff omitted to plead or give in evidence the statute of limitation; that the rejoinder concludes with a verification, though it only denies matters alleged in the replication, and should, therefore, have concluded to the country. *Joinder* in demurrer.

J. C. Spencer, in support of the demurrers, insisted, 1. That the 4th plea to the 1st count of the declaration was bad, because it set up matter in defence which was no bar to the action. It is a plea of *non damnificatus*, and hardly that; for the conclusion is not, in the general language of such a plea, that the plaintiff had sustained no damages, but merely that he had sustained none *within a year* after the escape. The plea of *non damnificatus*, in its broadest and most general language, would not be applicable. It is confined to a mere bond of indemnity. This is not so. The condition is, *that the gaoler shall well and faithfully, in all things, perform and execute the trust reposed in him, &c. and will not, at any time, suffer any prisoners, committed to his charge, to escape from the prison, through his neglect, until legally discharged, &c.* The declaration avers, that he permitted an escape, an act which, *per se*, subjected him to a forfeiture of the bond; and, whether the plaintiff had sustained damages or not, he must recover. This very point was decided in *Andrus v. Waring & others*, (20 John. Rep. 153) and still more distinctly in the previous case of *Woods v. Rowan & Coon*, (5 John. Rep. 42.)

The rejoinder to the replication to that plea is also bad, for the same reason. It not only seeks to support the plea, which is a qualified *non damnificatus*, but the matter which it

not setting up a proper defence to the action for the escape, which matter was not set up in the plea.

But *held*, also, that the plea, being properly one of *non damnificatus*, was bad, as being inapplicable to the condition of the bond, and the breach assigned;

Also, that the matter of substance set up in the rejoinder, viz. want of notice, neglect, &c. were no bar even when taken in connexion with the plea which it followed.

Held, also, that the 4th plea to the 2d count was bad for the same reasons; and

That the 1st and 2d pleas to the 2d count were defective in form; inasmuch as they were a mere denial of the substance of the declaration, and should, therefore, have concluded to the country.

The plea of *non damnificatus* is applicable to an action on a bond to *save harmless* and *indemnify* the obligee, but to an action on no other bond.

A gaoler, who has given a bond to his principal, the sheriff, not to permit an escape, cannot defend himself against an action for the breach of that condition, upon the ground that in an action against the sheriff, for an escape which the gaoler had permitted, the former neglected to plead the statute of limitation, which had run against the action.

A plea, &c. which introduces several facts, all of which are necessary to constitute but one point of defence, is not bad for duplicity.

A plea, &c. which introduces new matter, should conclude with a verification.

But where it denies the whole substance of the plaintiff's declaration, it should conclude to the country.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

that the several facts contained in it were connected and dependent, all tending to the point of defence sought to be introduced, viz. that judgment against the plaintiff was recovered through his default, in not availing himself of the statute of limitation, (1 R. L. 427, s. 26.) *Hel'*, also, that the rejoinder properly concluded with a verification; inasmuch as it introduced new matter, viz. the neglect of the plaintiff in

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

contains, is, in itself, no bar. It is also bad for the special causes assigned—*duplicity*, (1 *Ch. Pl.* 512) and a wrong conclusion, being to the Court instead of the country. It is also a departure from the plea. It admits that the plaintiff has sustained damages; but endeavours to throw the fault upon him, in not pleading the statute of limitation. The plea which it was to support, denies the damages. The departure in *Andrus v. Waring* was much like this.

The 1st and 2d pleas to the 2d count of the declaration, are bad for the special cause assigned, viz. a wrong conclusion. Each should have concluded to the country; because they advance no new matter, but take issue upon facts which are fully and distinctly set forth in declaring, and upon which direct issues should have been taken.

The 4th plea to the 2d count is still more objectionable. It is not only double or triple, but the 3d averment is objectionable upon the same ground which we take in relation to the 4th plea to the first count. It sets up matter which is substantially bad, and forms no defence. The bond was forfeited *eo instanti* with *Thatcher's* escape, and it cannot be material whether the statute of limitations had run against the escape or not. An objection of this kind can, at most, go only to the damages. If each fact set up in this plea would constitute a valid defence, they cannot be joined.

J. Platt, contra. To determine the sufficiency of the 4th plea to the 1st count, it is necessary to advert not only to the condition of the bond, as set forth in the declaration, but the breaches assigned. The condition was correctly stated by the opening counsel; but the only breach assigned is, that the gaoler permitted *Thatcher* to escape. To this, alone, the plea was intended as an answer; and if it is, in truth, a legal answer to the allegation of an escape, the plaintiff's action must fail. Being thus narrowed down to an escape, the case is altogether distinguishable from that of *Andrus v. Waring*, relied upon by the plaintiff's counsel. There were, in that case, a great variety of breaches insisted upon; but no escape from a *ca. sa.* was alledged. The latter is the only one insisted upon here, which the plea at-

tempts to answer, by saying that the Sheriff was not sued for the escape till all actions were barred by the statute of limitation of one year; and that, within the year, the Sheriff had sustained no damages. The plea has all the constituent requisites of a plea of *non damnificatus*; and the success of the Sheriff's action must depend upon the same ground as if the bond had been one of mere indemnity. If the two allegations of the plea be true, there is no damage to the Sheriff. He should have given notice to the bail, thrown the *onus* on them, and pleaded the statute of limitations. Having omitted these things, the whole is in his own wrong, and no damages are sustained, within the meaning of the condition. His honour Judge *Woodworth*, who delivered the opinion of the Court in *Andrus v. Waring*, remarks, that a bond like the one there in question, was not to be regarded as a bond of indemnity merely. If it had been given for indemnity, he admits that *non damnificatus* would be a good plea. It was not necessary to express an opinion upon this point, because the rejoinders were clearly bad, as being a departure from the plea; so that the demurrers must have prevailed, whether the plea was good for any thing or not. Even as to that bond, therefore, the question may not be considered as fully and finally settled by this Court. It is the less so, because his honour's opinion was founded on the case of *Woods v. Rowan & Coon*, also cited for the plaintiff. That case does decide, that a bond conditioned against an escape is not technically a bond of indemnity, and that a plea of *non damnificatus* is, therefore, inapplicable; but it has been repeatedly questioned, and finally overruled. It followed the case of *Tillman v. Lansing*, (4 *John. Rep.* 45) by which the community were so much agitated, that the legislature interfered by a declaratory act, in 1809 and 1810, (*sess.* 32, *ch.* 148; *sess.* 33, *ch.* 187; and *vid.* 1 *R. L.* 429, *s.* 6) confining an escape bond to the purposes of indemnity merely, and finally declaring, in terms, that the bond shall be for indemnity only. About the same time, the cases of *Jansen v. Filton*, (10 *John. Rep.* 549) and *Darry v. Mandell*, (10 *John. Rep.* 563) in the Court of Errors, overruled two former decisions; and the Court declared that, independent of the

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

statute, and upon common law principles, the bond was a mere indemnity. If so, according to the doctrine of all the cases, it is enough for us to plead *non damnificatus*. This is admitted in *Andrus v. Waring*. The declaration here assigns the escape alone for breach, and, *quoad hoc*, the question is precisely like that in relation to a bond for the gaol liberties. In *Andrus v. Waring*, the plaintiff proceeded upon much broader grounds. The declaration was in debt on bond, generally, without noticing the condition. Upon oyer, the condition was, that one of the defendants should well and duly perform the office of *Deputy Sheriff*, in all things according to law, and should render a just and true account of all business that should come into his hands, as a Deputy Sheriff ought to do, &c. His honour, Judge *Woodworth*, may very properly have said, that *non damnificatus* was a bad plea at this stage of the pleadings, because the matter was left open, and it was not seen to what point it might come. It was not narrowed down, as here, to an escape only. It did not appear what the plaintiff would go for; whether for moneys not accounted for, or neglect in the not serving process, or for an escape. A plea or averment may be good in one stage of the record, though it would be bad in another. No matter what followed that plea. Being bad at the point where it was put in, nothing which succeeded could make it good, even though the matter might have been so narrowed as to render the plea afterwards applicable, provided it had been reserved for a future purpose. That case is, therefore, not applicable here.

But whatever be the merits of the plea, it is said we have departed from it in the rejoinder to which the demurrer is taken. If we have done so, as the act consists merely in following where the plaintiff led us, it cannot be imputed to us as a fault. The departure will be found in the replication. This sets up a recovery against *M'Clure*, and notice of the suit in which the recovery was had. Not a word of this in the first count of the declaration. And is the plaintiff warranted in urging against us, as a departure, the introduction of facts which form an answer to his replication? He shifts his ground, and, by the replication, attempt

to ingraft into the first count the closing averments of the second. He enlarges the first count, by setting forth facts entirely independent of, and disconnected with it; calls upon us for an answer, and then censures us because we have complied with the necessity which he imposed.

ALBANY,
October, 1824.
M'Clure
v.
Exwin.

There is but a single demurrer to the 1st, 2d and 4th pleas to the 2d count; and if we maintain any one plea included in the joint demurrer, we must prevail. The second count sets forth the bond, condition, commitment and escape, an action brought for that escape, notice to the defendants during the pendency of the suit, and, finally, a recovery for the escape, against the Sheriff. The first plea denies the *escape and notice* of the suit; the second denies the commitment and notice of the suit; and the third denies the commencement of a suit within the year, notice of its pendency, and that the Sheriff availed himself of the statute of limitation; and all these pleas conclude with a verification.

To determine the manner in which these pleas should conclude, it is necessary to consult three classes of cases. One relates to a plea containing a simple negative of a naked fact, in which case it should conclude to the country; a second class is, where it sets forth a new fact, or a new set of facts, by way of avoidance, when it should conclude to the Court; and there is yet a third class of cases, where the conclusion is good either way. *Hedges v. Sandon*, (2 T. R. 459) belongs to the latter class. To a declaration upon bond, the defendant pleaded that it was given for a gaming debt; to which the plaintiff replied, that it was given for money justly due, and *not* for a gaming debt; and it was held that the replication might conclude either to the country, or with an averment; and, per *Buller, J.* "the general rule is that which has been stated by my brother *Ashurst*. If the replication put the whole substance of the defendant's plea in issue, he may conclude to the country. At the same time, there are exceptions to that rule, and there are many cases in which the conclusion is good either way." And he illustrates the proposition by the case of *Sanford v. Rogers*, (2 Wils. Rep.

ALBANY,
October, 1824.

McClure
v.
Erwin.

113.) "That was (says he) an action for goods sold. Plea, judgment recovered in the K. B. for the same promises. Replication, *nul-tiel record, et hoc paratus est verificare*. Demurrer, and special cause shewn, that, by the replication, the issue upon the plea in bar is complete, and the plaintiff ought not to have concluded by a general averment only. After argument, judgment was given for the plaintiff. The Court thought that the issue was completely joined; and, therefore, the conclusion might have been otherwise; but, inasmuch as the precedents were of conclusions with an averment, they were for supporting it. They said there was no general rule to be laid down as to these things. Practice had, in many instances, allowed special pleas, which amount to the general issue; so conclusions with an averment, where they may be to the country. And they said, that in *Gardiner v. Fisher*, (*Mich. 1 Geo. 1*) the defendant pleaded another action pending: the plaintiff replied, that the cause of action was different, *absque hoc*, that the cause of action in this and the former were the same as alleged in the plea; *et hoc paratus est, &c.* Special demurrer, because the replication should have concluded to the country; but judgment was given to answer over, because the traverse makes the point more certain. (*Sir T. Raym.* 199. *1 Vent.* 101. *2 Keb.* 692, *S. P.*) But they concluded with saying it might be either way. So are all the cases, except that of *Mulliner v. Wilkes*, which was passed over without much notice. Therefore, I am of opinion that, in such cases, the conclusion may be either way." Mr. Justice Ashurst said, "I thought that this case had been so well settled, by a variety of modern determinations, that it was not even intended to be argued. The general rule is this: Where the replication denies the whole substance of the defendant's plea, there the plaintiff may tender issue, and conclude to the country. But where he selects one out of several facts, he may traverse that one, and conclude with a verification." The rule laid down by Ashurst, J. extends, in terms, to this very case; viz. the 1st and 2d pleas demurred to. Certain facts are selected from the declaration, by each plea, and denied. This warrants the

conclusion of *et hoc paratus, &c.* (and *vid.* 1 *Staud.* 103, a. n. (1).)

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

As to duplicity in the rejoinder to the replication to the 4th plea to the first count, and in answer to the objection of duplicity to any of the pleadings, it is true, the general position will be found in *Co. Litt.* 304, a. that a plea, containing a multiplicity of distinct matters to one and the same thing, whereunto several answers, (admitting each of them to be good) are required, is not allowable in law. But this case does not come within that rule. The averments are not of distinct matters, or independent facts, requiring separate answers, but all the facts go to the same point of defence. All the facts averred are necessary to the defence. Abundant authority illustrating this distinction is to be found in the books. (*Robinson v. Bayley*, 1 *Burr. Rep.* 316. *Patcher v. Sprague*, 2 *John. Rep.* 462. 1 *Chit. Pl.* 512. *Plowd. Rep.* 193, 194. *Currie & Whitney v. Henry*, 2 *John. Rep.* 433.) Courts are liberal in allowing these pleas, where there is the remotest tendency, in the several matters, to a single point; though there is good sense in the rule which denies plain and palpable duplicity. After laying down the premises in the plea, that the statute of limitations had run, and following it, in the rejoinder, with the fact that no notice of the suit pending was given, and no limitation pleaded, the concluding clause is mere matter of inference, and may be rejected as surplusage. It was necessary to say, the Sheriff neither pleaded, gave notice, or otherwise availed himself of the defence, after saying that the suit was barred. The whole is a mere allegation that he did not use due and legal means of defence. Yet we might have been liable on another contingency, although the suit was barred; as if the Sheriff had given us notice, and troubled his head no further about it, and we had suffered judgment to go against him. It was, therefore, necessary, in order to exclude all cause of action, to shew that we had no notice of the suit. The rejoinder embodies the whole merits of the defence.

The same remarks, so far as duplicity is concerned, apply both to the 4th plea to the second count, and the rejoinder to

ALBANY,
October, 1824.

M'Clure
v
Erwin.

the replication to the 4th plea to the first count, when taken in connexion with the plea which it follows.

Spencer, in reply, did not deem it necessary, indeed it would hardly be decorous, to enter into a systematick vindication of the late judgment of this Court, in *Andrus v. Waring*, against the criticisms of the gentleman. But he would ask the indulgence of the Court in remarking, that the history given, of conflicting decisions, and legislative declarations, relate entirely to another species of bond—a bond given by the sureties of a prisoner on execution, to secure him the gaol liberties. Without much regard to the wording of that contract, it is finally settled, that it is one of mere indemnity. By the force of legislative acts, and the decisions of our tribunals, it forms an exception to the rule which applies to all other bonds similarly worded. It is sufficient to reply, that neither *Andrus v. Waring*, nor this case, are actions upon such a bond. The former was on a bond from a Deputy Sheriff, and the present on a bond from a gaoler, conditioned against defaults in the execution of their respective offices, against suffering escapes, &c. The reasoning of the Judge, therefore, in *Andrus v. Waring*, is sound, and accords with the rule which governs in these cases. *Holmes v. Rhodes*, (1 *L. & P.* 638) referred to in *Andrus v. Waring*, is a case as strongly to our purpose as *Woods v. Rowan & Coon*, (5 *John. Rep.* 42.) The reasoning of the Court, in *Andrus v. Waring*, was pertinent and necessary, and moreover directly applicable to the plea of *non damnificatus* in this case. The question was the same as here, upon the 4th plea to the first count; although the plaintiff might not have specifically pleaded his damages in the same stage of the record. It is said, we have narrowed down our claim to the escape: So, in *Andrus v. Waring*, the demand was narrowed to a point, which would as much warrant a plea of *non damnificatus* as the present declaration. It was seen, from the nature of the bond, on oyer, what breaches alone the plaintiff could insist upon, and *non damnificatus* would reach either of them as effectually as the present. One branch of the condition was, that the Deputy should

pay over moneys, which, from its nature, must have been, and was followed by an averment that he had neglected this, and thrown the duty upon the plaintiff, by which the latter had received damage. The same remark is applicable to all the breaches.

The duplicity in the rejoinder is almost too plain to admit of demonstration. It sets up three distinct matters, relating to as many distinct allegations in the assignment of breaches; and how is it possible to dispose of the several issues to be joined upon these matters, by a single finding in the *postea*?

Several cases were cited by the gentleman, as to the manner in which pleas are to conclude; the general rule upon which we insist is not denied, and the cases cited merely go to shew a well established and admitted exception in the plea or replication of *nul tiel record*. Some elementary writers, it is true, have confounded the conclusion of this plea with a conclusion upon matter *in pais*. In relation to this, disconnected with matter of record, *Chitty* (1 *Chit. Pl.* 535 to 539) reconciles all the cases to the distinction that, where new matter is introduced, a verification is proper; but where denial is interposed, either to the whole substance of the declaration or plea, or to any insulated fact which they contain, the proper and only conclusion is to the country. The single anomaly which he allows is, where the traverse relates to a matter of record. Then suppose the matters do all tend to one point, in the 4th plea to the second count, and the rejoinder in support of the 4th plea to the first count, being no more than simple denials of matter *in pais*, they should not conclude with a verification. What is the pleader to do? Carry on a perpetual negative, at the will of the defendant? In this way, the plaintiff can never command an issue, and prepare his cause for trial.

It is said the rejoinder contains all the merits of the former pleas. If so, it may be added, that it contains all their faults. Neither the plea principally in question, nor the rejoinder, contain matter which will constitute a bar, if the substance alone is to be regarded. That the action was not brought against the Sheriff within one year is no bar,

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

ALBANY,
October, 1824.

McClure
v.
Erwin.

The statute of limitation was a privilege personal to the Sheriff. It is confined to him. The statute has not extended it to the bail. They are not embraced, either in its terms, or its policy. Notice of the suit pending was not necessary. Denying this was a mere anticipation of what the plaintiff might possibly have replied, to sustain his action upon some point not yet arisen. You might as well anticipate the defence of infancy, by averring in your declaration that goods were necessities.

Again; having shown, that if the rejoinder is a mere negative, the conclusion is wrong; we say, if it puts in new matter, it is, therefore, a departure, and no matter how it concludes. Let the defendant choose either horn of the dilemma; it is alike fatal to his rejoinder.

Curia, per SUTHERLAND, J. The first point made by the plaintiff is, that the fourth plea to the first count of the declaration is bad, as it sets up matter of defence which is no bar.

The action is brought by the plaintiff as late Sheriff of the county of Steuben, upon a bond given by *Benjamin Parker*, the gaoler, and the defendants as his sureties, conditioned that he should well and faithfully, in all things, perform and execute the trust reposed in him as gaoler, during his continuance in office, without fraud, deceit, or oppression; and that he would not, at any time, suffer any prisoner committed to his charge to escape from the prison, through his neglect until legally discharged. The first count of the declaration, after stating the bond and condition, avers, that after giving the bond, and while *Parker* was gaoler, one *Thatcher* was committed to the gaol under a *ca. sa.* at the suit of one *Hines*; and that after he was so committed, *Parker*, being gaoler, negligently suffered and permitted him to escape; by means whereof the plaintiff sustained damage, &c. To this count the defendant pleaded four separate pleas, the last only of which is in question. It is, that *Hines* (the plaintiff in the execution) did not, within one year from the time of the escape, prosecute an action for it against the plaintiff; and farther, that the plaintiff did not, at any time, within the

year, sustain any damage by reason of the escape. (*Vid.* 1 R. L. 427. s. 26.) To this plea the plaintiff replied, that after the escape of *Thatcher*, *Hines* prosecuted an action of debt against the plaintiff for the escape, and recovered judgment; and that while the suit was pending, and before judgment, the defendants had notice of it. To this replication, the defendants rejoin that they had not notice of the suit before judgment; that the defence was conducted without their privity or knowledge, and the plaintiff wholly omitted to plead or otherwise avail himself of the fact that the statute of limitation had run against the escape; and so, they say, the judgment recovered against the plaintiff was so recovered by his own neglect and default. This rejoinder the defendants concluded with a verification; and the plaintiff demurs to it for two special causes, viz. duplicity and a wrong conclusion.

Neither of the two formal exceptions are well taken. The rejoinder is not double within the sense of the rule relied upon. The several matters which it contains all tend to the same conclusion. The point or main proposition which it seeks to establish is, *that the judgment which Hines recovered against the plaintiff, was recovered against him through his own neglect or default, in not availing himself in his defence of the fact that the suit was not commenced within a year after the escape.* In order to maintain that proposition, the defendants aver, *first*, that they had no notice of the suit; and that the plaintiff defended it without their privity or knowledge. But this, of itself, is no ground of defence; for if the plaintiff had set up every matter of defence within the power of the defendants, they were not injured by the omission. This became important, therefore, only when connected with the subsequent averment, *that the plaintiff omitted to avail himself of a legal defence.* Nor would the latter averment, alone, have been sufficient. The plaintiff, in his replication, had distinctly charged the defendants with notice of the suit. If that averment is material, and the defendants had omitted all answer, the notice would have stood confessed upon the record; and been a complete answer to the allegation that the plaintiff had not availed himself of every legal matter of defence. The two

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

ALBANY,
October, 1824.

M'Clure
v.
Erwin.

averments, therefore, form one connected proposition; and are constituent parts of the same entire defence. (1 *Chit. Pl.* 512. 1 *Burr.* 316. 2 *John. Rep.* 433. *id.* 462.)

The rejoinder properly concluded with a verification. The averment that the plaintiff neglected to avail himself of the fact that the suit of *Hines* was not commenced within a year after the escape, was new matter. The plea alleges merely, that the suit was not commenced within the year. The replication answers that allegation, by averring that the defendants had notice of the suit. The rejoinder denies the notice; and then adds that the plaintiff neglected to avail himself of that defence. Whether this be a departure from the plea or not is a distinct question; but it is clearly new matter; and brings the rejoinder within the established rule of pleading, that whenever new matter is introduced on either side, the conclusion must be with a verification. (1 *Chit. Pl.* 537. 1 *Saund.* 103, n.(1)

But the material inquiry is, whether the plea and rejoinder are good in substance. The plea is substantially one of *non damnificatus*. This is a good plea in all cases where the condition is to indemnify and save harmless; because it answers the condition in terms. But it is good in that case only. (1 *Saund.* 117, n. (1) *Codner v. Dalby*, Cro. Jac. 363. *Horseman v. Obbins*, *id.* 634. *Hulland v. Malken & Bristow*, 2 *Wils.* 126. *Manser's Case*, 2 *Rep.* 4. *Woods v. Rowan*, 5 *John. Rep.* 42. *Andrus v. Waring*, 20 *John. Rep.* 153.) The plea should go to the right of action—not to the question of damages. The plaintiff, so far as it depends upon the pleadings, shows his right to recover, by setting forth the bond with its condition, and alleging a breach of that condition, either general or special, as the case may require. If the defendant, by his plea, admit that the condition has been broken, he concedes the plaintiff's right to recover; and by not denying the breach assigned, but instead of doing this, interposing the general plea of *non-damnificatus*, he, in effect, admits the breach. In this case, the part of the condition alleged to be broken is, that *Parker would not, at any time, suffer any prisoner to escape*. The plea is, that the plaintiff did not suffer any damage by the es-

ALBANY;
October, 1824.M'Clure
v.
Erwin

cape. The escape, and, consequently, the, breach of the condition, are thus admitted ; and the right of action follows. *Andrus v. Waring*, (20 *John. Rep.* 153) is in point. That was an action upon a bond given by a Deputy Sheriff to his principal. The condition, so far as it related to the question raised upon the pleadings, was substantially the same as in this case. It was held not to be a bond of indemnity ; and the plea of *non damnificatus* was overruled as inapplicable. The rejoinder is bad for the same reasons, and must follow the fate of the plea. It admits the breach of the condition, alleging that the plaintiff might have avoided the consequence only of that breach.

The *second* count of the declaration differs from the first only in this, that it sets forth the suit and recovery by *Hines* against the plaintiff for the escape of *Thatcher*, and avers notice of that suit to the defendants. The first plea to this count denies the escape of *Thatcher*, and notice of *Hines'* suit against the plaintiff ; and concludes with a verification. The *second* plea denies that *Thatcher* was committed to gaol while *Parker* was gaoler, with notice of *Hines'* suit ; and also concludes with a verification. As to the *third* plea, there is no question, the plaintiff having replied and taken issue upon it. The *fourth* plea alleges that the suit of *Hines* against the plaintiff was not commenced within a year after the escape ; that the defendants had no notice of the suit ; and that the plaintiff did not avail himself, in his defence, of the fact that it was barred by the statute of limitation. The plaintiff demurred to the *first, second and fourth* pleas specially ; and one cause of demurrer assigned both to the *first and second* pleas is, that they should have concluded to the country ; and not to the Court. The exception is well taken. Those pleas deny the whole substance of the declaration. In such case the plea should conclude to the country. (1 *Chit. Pl.* 535. 2 *T. R.* 439.) The *fourth* plea is good in form, but bad in substance, for the reasons which have already been given in relation to the *fourth* plea to the first count.

Judgment for the plaintiff upon all the demurrers.

ALBANY,
October, 1824.

Mascraft

v.

Van Antwerp.

THE PEOPLE against MARSH, Sheriff of Onondaga.

Where the original plaintiff is a non-resident of this state, his attorney is liable to pay the costs of setting aside an attachment for irregularity, granted against the sheriff for not bringing in the body.

The people are merely a nominal party, and the case is within the spirit of the 13th rule of January term, 1799.

In October term, 1823, an attachment was granted against the defendant for not bringing in the bodies of *Wallace* and *Baker*, in a cause at the suit of *Butterfield*, which, at the last February term, was set aside as irregular, with costs. The plaintiff, *Butterfield*, being a non-resident of the state,

John Porter, now moved for a rule requiring his attorneys to pay the costs, within the 13th general rule of January term, 1799.

J. Platt, contra, said the application certainly does not come within the terms of that rule. The plaintiffs in this suit are not non-residents.

Curia. True, but the people are a nominal party. The suit is really in favor of *Butterfield*; and the defendant comes within the spirit of the rule.

Motion granted.

In the matter of MASCRAFT against VAN ANTWERP, Sheriff of Albany.

A sheriff, who advertises for sale on but one execution, cannot sell under that and another execution, coming subsequently to his hands, by virtue of the same advertisement.

On a sale of lands, the whole purchase money should be inserted in the certificate of sale.

MAY 11th, 1824, a *fi. fa.* was issued, and delivered to the Sheriff of Albany, in favour of *Stephen P. Schuyler*, against *Benjamin Covell*, for \$60,09, on a judgment obtained in a Justice's Court, a transcript whereof had been filed in the Clerk's office, May 6th, 1824. On this execution, the Sheriff advertised for sale two small lots in *Wateroliet*, to be sold June 23d, 1824. The execution upon *Schuyler's* judgment was delivered to the Sheriff on the 11th May, 1824, and on the same day another *fi. fa.* was delivered to a deputy of the same Sheriff against *Covell*, in favour of *John V. Fassett* and *William I. Seldon* for \$113,72 on a judgment in this Court, docketed March 18th, 1824; but the advertisement of sale did not include this execution, which was delivered at a la-

ter hour in the day than that of *Schuyler*. At the time and place appointed in the advertisement, the two lots were old, both executious being then in the Sheriff's hands, which was known to the purchaser at the sale. *William Mascraft* purchased, at a bid of \$175.

ALBANY,
October, 1824.

Beard
v.
Van Wickle.

The question was now submitted by *J. V. N. Yates*, in behalf of *Mascraft*, and *Cornelius Van Antwerp*, the Sheriff, in person, whether in the certificate of sale he ought to state both executions, so as to entitle the purchaser to all the benefits of a sale under both.

It was insisted, in behalf of *Mascraft*, that when a Sheriff advertises on one execution, and subsequently receives another, the sale proceeds on both, without requiring a second advertisement. A debtor's property might never be sold, if every execution, as it came to hand, required another advertisement.

The Sheriff submitted, that, as the advertisement specified but one execution, the certificate of sale should be confined to that alone.

Curia. As the Sheriff advertised on one execution only, he can state no other in the certificate or deed of sale; but the whole sum bid by *Mascraft* should be inserted, that the debtor or a creditor, coming to redeem, may know the amount of principal and interest he is to pay, and the purchaser, on the other hand, be secure of receiving the amount which he has paid.

Rule accordingly.

BEARD against VAN WICKLE.

The plaintiff declared upon a promissory note of about \$103, and joined the money counts in the same declaration. Where the general money counts are joined with one on a promissory note in the same declaration, it is erroneous for the clerk to assess the damages, without first entering a *nolle prosequi* as to the money counts. In such a case, the defendant cannot compel the plaintiff to enter a *nolle prosequi*, and it is at his option, to assess damages by a jury, though his claim be founded on the note alone.

ALBANY,
October, 1824.

Bank of Co-
lumbia.

v.
Southerland,

Judgment having passed against the defendant by default, the plaintiff assessed his damages upon a writ of inquiry, which the defendant now moved to set aside, on the ground that the damages should have been assessed by the Clerk, inasmuch as the plaintiff's demand was confined to the promissory note, upon which alone he claimed damages before the jury; that the defendant ought not to be subjected to the additional costs of a writ of inquiry; and *Laws*, (sess. 41, ch. 259, s. 10) and 1 *Dunl. Pr.* 384, were cited in support of the motion.

R. S. Church, for the motion.

W. Sisson, contra.

Curia. The plaintiff cannot have his damages assessed by the Clerk, where the declaration includes the money counts, with a count upon a promissory note, without first entering a *nolle prosequi* upon the former. (*Burr v. Waterman & Wells*, 2 *Cowen's Rep.* 36 to 39, note (f).) The defendant cannot compel the plaintiff to enter a *nolle prosequi*. This is at his option; and, of course, he must choose whether he will proceed by assessment before the Clerk, or a writ of inquiry.

Motion denied with costs.

THE PRESIDENT, DIRECTORS AND COMPANY, OF THE BANK
OF COLUMBIA, against SOUTHERLAND, impleaded with
SOUTHERLAND.

Forms and
practice, on
paying money
into court.

The sum

paid is to be deemed stricken out of the declaration, and unless a larger sum is proved by the plaintiff, at the trial, verdict should be for the defendant.

But where, in such case, a verdict is taken for the plaintiff, subject to the question of practice, to be settled by this court, that question must be determined on a case made—not as a non-enumerated motion.

and payment, with notice of special matter. Before pleading, on the 9th March, 1824, the defendant paid \$60 into Court.

The cause was tried at the last *Columbia* Circuit, before WALWORTH, Circuit Judge, when the plaintiff sought to recover upon another note, given by one *Harris*, under the money counts, and evidence was given on both sides touching this claim.

The defendant then gave in evidence the following rule :

" *David Southerland*, impleaded with
Ebenezer Southerland,
 ads.

The President, Directors & Company
of the Bank of Columbia.

In Supreme Court,
 March 9th, 1824. On motion of *M^r Kinstry & Tallmadge*, attorneys for defendant, ordered, that the defendant have leave to bring into Court \$60 ; and thereupon, unless the plaintiff shall accept thereof, with costs to be taxed, in full discharge of this action, the said sum of \$60 shall be struck out of the declaration, and the said sum shall be paid out of the Court, to the plaintiff or his attorney ; and on the trial of the issue in this cause, the plaintiff shall not be permitted to give evidence for the sum brought into Court.

(A copy) *John Keys Paige, Clk.*"

Also, the following receipt :

"Received from *M^r Kinstry & Tallmadge, Esqrs.* the defendants' attorneys in the above cause, \$60, referred to in the above rule, and to be applied or paid agreeable to said rule.
 March 9th, 1824.

John Keys Paige, Clk."

It was admitted, by the counsel for the plaintiff, that the amount paid into Court exceeded the amount due upon the note declared on, at the date of the rule ; and that the rule and receipt for the moneys had been served on the plaintiffs' attorney.

The Judge, having some doubt about the practice of paying money into Court, said he would direct the jury to find their verdict, without regarding the money paid into Court, and reserve all questions of practice for the Supreme Court.

ALBANY,
 October, 1824.

Bank of Co-
 lumbia
 v.
 Southerland.

ALBANY,
October, 1824.

Bank of Co-
lumbia
v.
Southerland.

He accordingly directed the jury, that if they were of opinion that the defendants were liable for the amount of the *Harris* note, they would find a verdict for the plaintiff for this, together with the defendants' note, both being \$182,22; but if they were of opinion that the defendants were not liable for the amount of the *Harris* note, that they would then find a verdict for the plaintiff, for the sum due upon the note of the defendants, amounting to \$62,10. The jury found for the plaintiff, to the amount of the latter sum.

D. B. Tallmadge, now moved that a judgment be entered for the defendant, upon an affidavit stating the above facts. The motion was noticed as a non-enumerated motion. He cited 1 *Saund.* 33, n. (2); *Griffetks v. Williams*, (1 T. R. 710.)

E. Williams, contra, objected that the motion should be brought on as an enumerated motion upon a case made.

Curia. It is irregular to come in this form. Like all other questions arising on the trial, which relate to the direction of the Judge, or points reserved there, it should be brought here upon a case made. But the practice is well settled, upon the facts before us, that, in a case like this, where money may be properly paid into Court, the sum paid in must be considered as stricken out of the declaration. It is a defence, *pro tanto*, and unless the plaintiff proves a sum beyond what is paid, there should be a verdict for the defendant. We deny this motion, with costs; but as the form of bringing it forward has been misapprehended, we give the defendants ten days, within which to make a case, and bring the question properly before us.

Rule accordingly.

ALBANY,
October, 1824.Jansen
v.
Tappen.M'KINSTRY *against* DAVIS and WIFE.

BOTH the defendants had been sued, and judgment obtained against them in *assumpsit*; but *Davis*, having been discharged under the *act to abolish imprisonment for debt in certain cases*, he was not liable to the imprisonment of his body, and the plaintiff stipulated to allow him the benefit of this discharge, without plea. Having proceeded regularly to judgment against him and his wife, the plaintiff issued a *ca. sa.* upon which, by his direction, the wife alone was imprisoned.

A *feme covert* may be imprisoned on a *ca. sa.* with or without her husband; tho' otherwise as to *mesne process*.

C. Miller, moved that she be discharged.

E. Williams, contra.

Curia. Clearly, this motion cannot be granted. A *feme covert* is liable to be imprisoned on a *ca. sa.* with or without her husband; and so are all the cases; (a) though it is otherwise as to *mesne process*. (b)

Motion denied.

(a) See *Bac. Abr. Baron & Feme*, (L) and the cases there cited.

(b) See *Bac. Abr. Baron & Feme*, (L) and *id. Bail in Civil Causes*, (B) 5, and the cases there cited.

JANSEN and JANSEN, administrator, *against* TAPPEN.

MOTION for a reference, in behalf of the plaintiff; but it appeared that, besides other pleas upon which issues of fact were joined, the defendant had pleaded *non assumpsit infra sex annos*, to which the plaintiff had replied, and the defendant had demurred to the replication, upon which the plaintiff had joined in demurrer; which issue in law was not yet determined; and the motion was opposed for this reason.

A reference will not be granted, if there be a demurrer in the cause, which relates to the whole action, and is undetermined.

ALBANY,
October, 1824.

The People
v.
Tefft.

Myer & Van Buren, for the motion.

H. M. Romeyn, contra.

Curia. The motion must be denied. Here is a demurrer pending upon a replication to a plea which goes to the whole cause of action. The motion is premature; for, should the report be for the plaintiff, still the decision upon the demurrer may be for the defendant, which would render this proceeding nugatory.

Motion denied.

THE PEOPLE *against* TEFFT.

Practice as to taking bail on recognizance, upon arrest by attachment for contempt.

A defendant being arrested by attachment, for a contempt merely technical, and offering to give bail for his appearance, but the sheriff declining to go with him before a judge for this purpose, and having appeared and answered interrogatories, was discharged, on payment of costs, not including the sheriff's fees for attendance upon the attachment.

When, how, before whom, bail on attachment should be taken; and the duty of the officer taking it.

What the sheriff should do on arrest.

Party's own recognizance to be taken, or plaintiff may demand bail.

THE defendant, a Justice of the Peace, being brought up on an attachment, at the present term, for a contempt in disobeying a rule to make a further return to a certiorari, had answered interrogatories, explaining the reason of his neglect, and now returned fully, and to the satisfaction of the plaintiff's counsel; but it was agreed that he must pay the costs; and the only question was, how much these should be. The defendant had been arrested upon the attachment, by the Sheriff of the county of Erie, where he resided; and after being so arrested, the Sheriff suffered him to go at large, which he did till the return day of the attachment, when he voluntarily appeared. Shortly after the arrest, however, the Sheriff told him that he was advised by the attorney for the plaintiff, that he must attend this Court personally, to return the attachment, upon which the defendant offered to give bail, or a sufficient recognizance to appear, which the Sheriff told him he could not accept; and attended this

Court accordingly. The Sheriff made an affidavit that he acted in good faith, and as he supposed his duty to be.

ALBANY,
October, 1824.

The People
v.
Test.

J. Platt, for the plaintiffs.

S. M. Hopkins, contra.

Curia. The usual practice is, when the defendant is arrested upon the attachment, either to take his recognizance, or the recognizance of him and his bail, conditioned that he shall appear at the return day, &c. There is, in general, no need of committing him to close confinement. But the plaintiffs, or rather the party who prosecutes in their name, may exact not only the defendant's recognizance, but that of a surety; and, in either event, the books of practice say, the Sheriff should, in all cases of contempt, indiscriminately, take the defendant before a Judge, who will exercise a sound discretion, under the circumstances of the case, whether the defendant shall be let out on bail at all, and upon what terms, whether upon his own recognizance alone, or with a surety or sureties, and in what amount. This is highly reasonable and necessary. It would be extremely rigorous, in the case of a trifling contempt, to commit a party to close custody, and finally conduct him (as in this case) a distance of 300 miles, at enormous expense, for a contempt which is, perhaps, merely technical, and unattended with a single circumstance of aggravation. We think, therefore, that when the party requires it, the Sheriff should take him before a Judge, or commissioner authorized by the statute to take bail in these cases, who will determine what shall be the proper course, on being instructed as to the nature of the case. If not aggravated, and nothing beyond costs appears to be involved in the issue, a recognizance, in the usual sum of \$100, will be taken, or a larger sum, if the aggravation of the offence or the amount in controversy shall demand more. In ordinary cases, too, when the defendant comes in upon the attachment, his recognizance is taken in the usual sum, to appear, *de die in diem*, and answer interrogatories. In the present case, it could not be necessary for the Sheriff to in-

ALBANY,
October, 1824.

Jackson
v.
Thurston.

cur the loss of time, and the heavy disbursements incident to a personal attendance. Let the defendant be discharged, on payment of costs to be taxed, exclusive of those for the attendance of the Sheriff upon the attachment, for the purpose of bringing the defendant into Court.

Rule accordingly.

JACKSON, *ex dem.* LIVINGSTON and others, *against* THURSTON.

Where a verdict is set aside, on the ground that it was against the weight of evidence, this should be on payment of costs by the party against whom the jury found. AT the *Sullivan* Circuit, the jury found a verdict for the defendant, which was afterwards set aside by this Court, and a new trial granted, *with costs to abide the event*. The sole ground of setting aside this verdict was, that the jury had found against evidence, and, on deciding upon the case, the Court did not advert to this in reference to the costs of the trial. And it now being mentioned to the Court, that the rule was wrong in this respect—

Per Curiam. It is so. The jury having decided contrary to evidence, the rule should have been, on payment of costs by the plaintiff. Such is the uniform practice. Let the rule be modified accordingly.

Rule modified.

NOTE. The order for setting aside the verdict, and that the costs abide the event, was entered at a previous term.

ALBANY,
October, 1824.Cowen
v.
Bush.COWEN *against* BUSH.

ON error from the *Washington* Common Pleas. The cause was brought into that Court by appeal from a Justice's Court, wherein *Cowen* recovered a verdict and judgment of \$50, against *Bush*. The latter appealed to the Common Pleas, and, according to the rules of practice in that Court, assigned errors generally, upon the coming in of the return, and *Cowen* pleaded *in nullo est erratum*. The cause was, thereupon, continued by *Curia advisare vult*, to *December* term of that Court, 1820; and then the record proceeded as follows: "Whereupon the said parties elected to have the said cause tried by the said Court, and not by a jury; and thereupon the said Court caused the said parties to proceed to the hearing of the said cause, on the examination, in open Court, of the witnesses named in the said return, that were sworn and testified before the said Justice; whereupon all and singular the said premises being seen, and by the Court, &c. fully understood," &c. (Judgment of reversal, as upon a writ of error.)

It is erroneous for a court of common pleas to proceed as a court of error, on appeal from a justice, and try the cause without jury, even though both parties elect this form of trial.

L. Wait, for the plaintiff in error. The Court below erected themselves into a Court of Error; and all the proceedings went on upon this idea. They profess to give judgment of reversal as to the proceedings of the Justice, whereas they have no power even to reverse their own judgments. At most, this was an arbitration—a reference by consent, without any agreement that the Court should give judgment, which is void, within the cases of *Camp v. Root*, (18 *John*. 22) and *Yates v. Russell*, (17 *id.* 461.) The Court were bound to proceed upon this appeal, according to the course of the common law, which ties them to a trial by jury.

[Here *Wait* was stopped by the Court, who desired to hear the other side.]

R. Weston, for the defendant in error. It appears of record, that the parties elected the Court to stand in the place of a jury, and perform their office.

ALBANY,
October, 1824.

Backus

v.
Smith.

[WOODWORTH, J. So far it was very well; but where is the consent that they should go farther, and give judgment?]

Weston. Numerous cases are cited in *Yates v. Russell*, where the parties substituted a less number of jurors than 12 to try the cause, upon which judgment was rendered, and holden well.——

[WOODWORTH, J. But had the Court any other rights than what were conferred by the agreement of the parties? Is it any thing more than the selection of three by-standers, to arbitrate this matter?]

Weston. It is like a trial by 3 jurors.

[SUTHERLAND, J. But in the cases to which you allude, all the forms of a trial are preserved—a venire, return, and a formal verdict entered. The record was perfect.]

Weston. Certainly the same thing was intended here. The election spoken of in the record, implies an agreement that the act of the Court should be equivalent to the finding of the jury. A party for whose benefit the trial by jury is intended, may waive it.

Wait, in reply, was again stopped by the Court, who all agreed that the case was too plain for argument.

Judgment reversed.

BACKUS against SMITH.

The party against whom a reference is moved, may nominate one of the referees, instead of any one named in the notice; but he cannot, by shewing cause, entitle himself to a further nomination. If a name is rejected for cause, it lies with the mover to nominate a substitute. So the mover is always entitled to nominate 2 referees.

E. LIVINGSTON, moved to refer this cause.

J. Platt, contra, read an affidavit, shewing that one of the referees named in the notice of the motion was not indifferent. So the mover is always entitled to nominate 2 referees.

ent between the parties ; and then claimed the right allowed the party against whom the motion is made to substitute one referee, as of course, instead of one named by the mover, and also to nominate one instead of the referee struck out for cause.

ALBANY.
October, 1824.

Nichols
v.
Cowles.

Savage, Ch. J. The settled practice is otherwise. You substitute one referee for any one named in the notice ; and the mover may substitute some other person for the one against whom cause is shewn. The mover is always entitled to the nomination of two referees.

Livingston, then nominated ; and,

Per totam Curiam—

Rule accordingly.

NICHOLS against COWLES.

J. A. SPENCER, moved to set aside the writ of *certiorari* to a Justice's Court, because the affidavit upon which it was founded was entitled in this Court ; and cited *Haight v. Turner*, (2 *John. Rep.* 371) and *Whitney v. Warner*, (2 *Cowen's Rep.* 499.)

An affidavit for a *certiorari* must not be entitled in this court.

D. Cady, contra.

Curia. The motion must be granted.

Rule accordingly.(a)

(a) See *Ex parte John Nehre*, 1 *Barnes & Cross*. 73, S. P.

ALBANY,
October, 1824.

Hasbrouck
v.
Schoonmaker.

CROMWELL *against* VAN RENSSELAER, gentleman, one, &c.

A defendant who is a counsellor of this court, making an affidavit to change the venue, need not swear to the advice of counsel that his witnesses are material.

For the purposes of the motion, the court will take notice that he is of the degree of counsel.

J. S. VAN RENSSELAER, the defendant in person, moved to change the venue in this cause, but his affidavit did not state that his witnesses were material *as advised by counsel*; nor did it state that he is a counsellor of this Court.

A. Conkling, contra, objected that, for this reason, it was insufficient.

Curia. We will take notice, for the purposes of this motion, that the defendant is himself a counsellor of this Court, and requires no advice upon that question *aliunde*.

Conkling, then shewing by affidavit, that a balance of witnesses for the plaintiff resided in the county where the venue was laid, the motion, for this reason, was denied, without costs.

Rule accordingly.

HASBROUCK & OTHERS *against* SCHOONMAKER.

A plaintiff recovering at the circuit for a trespass under the statute, (1 *R. L.* 525-8, s. 29) a sum which, when trebled, amounts to less than \$50, is not entitled to recover treble costs.

A Justice has jurisdiction of such an action.

Semble, therefore, that it does not necessarily involve a question of title to land.

In trespass for cutting timber, contrary to the statute (1 *R. L.* 525, 526, s. 29,) the plaintiffs had recovered damages to \$6; and

C. H. Ruggles, for the plaintiff, moved for treble damages and treble costs. He said, this did not depend upon the general statute of costs. Treble costs result from the statute which inflicts treble damages. This means treble the *Supreme Court* costs. *Beekman v. Chalmers*, (1 *Cowen's Rep.* 584) must have gone upon this ground. It denies any effect to the general statute, (*sess.* 41, *ch.* 94, s. 5) providing that in actions cognizable before a Justice, the plaintiff shall not recover costs, unless his damages exceed 50 dollars.

Another ground of the application is, that a Justice has no cognizance of this action. It is true that the statute gives

him, in terms, jurisdiction of trespass on lands ; but not of trespasses committed under this statute. Again, he has no power to try an action, where the title comes in question. In this action, is it not necessarily in question ? It has been holden at the Circuit that, in an action for a statute trespass, it is not enough for the plaintiff to shew himself in possession, as he might in trespass *quare*, &c. at the common law. The penalty is for cutting timber, treble the value of which is to be recovered ; and possession must be followed by proof of title. A reversioner or remainder man might maintain this action, even against the tenant in possession. (*Vid. Wickham v. Freeman*, 12 *John. Rep.* 183.)

ALBANY,
October, 1824.

The People.
v.
Butler.

SUTHERLAND, J. We have frequently had the question before us, and never entertained a doubt that this action may be brought before a Justice ; and

Per totam Curiam, (without hearing *J. Sudam*, who was to have argued against the motion,) the motion for trebling the damages was granted, but denied as to the costs.

Rule accordingly.

THE PEOPLE against BUTLER.

At the last Oyer and Terminer of *Oneida*, the defendant was convicted on an indictment, which set forth, that, on the 9th March, 1824, at &c. a certain indictment was found and presented, in due form of law, in the Court of General Sessions of the Peace, then and there held before *Truman Enos* and *Samuel Jones, Esquires*, Judges of the County Court, in and for said county, and *Uriah Stephens, Esquire*, one of the Justices of the Peace of said county, and others their associates, all Justices assigned to keep the peace, and also to hear and determine, &c. by the first count of which said indictment, &c. it was charged and alleged that *Edmund But-*

The true construction of the statute, (*sess. 42, ch. 246, s. 4.*) providing that every person who shall be a second time convicted of petit larceny, shall be adjudged to imprisonment in the state prison, is, that the 2d offence must be committed

after a conviction for the first, in order to warrant the enhanced penalty.

It is not enough that there be two successive petit larcenies by the same person, which are severally and successively prosecuted to conviction ; though the second indictment charge the first conviction as a part of the crime.

ALBANY,
October, 1824.

The People
v.
Butler.

ler, late, &c. on the 1st day of *March*, A. D. 1824, with, &c. at, &c. one bag of the value of \$1, the goods and chattels of, &c. then and there being, feloniously did steal take and carry away, to the great damage, &c. ; that by the 2d count of the said indictment, &c. it was charged and alleged, &c. that he received a bag and two bushels of corn, knowing them to be stolen, on the 1st *March*, 1824 ; that process issued, by which he was arrested and brought before the Court, on the 9th *March*, 1824, pleaded not guilty, and at the following Court of Sessions in *May*, 1824, was convicted, on his *relicta and cognovit* of the 1st count ; that a *nolle prosequi* was entered as to the 2d count, and that *Butler* was fined \$10 ; that the said *Butler*, on the 1st day of *March*, A. D. 1824, with, &c. at, &c. one blanket of the value of \$5, &c. the goods and chattels of, &c. then and there being, feloniously did steal, take and carry away, to the great damage, &c.

The record of the conviction upon this indictment being now brought here upon certiorari, the question was, whether the offence, as charged, was within the statute of 1819, (*sess. 42, ch 246, s. 4.*)

Talcott, (Attorney General.) The statute under which this conviction took place, provides, "that every person who shall, hereafter, be a second time, or oftener, convicted of petit larceny, shall be adjudged by the Court who may give judgment thereon to imprisonment in the state prison, &c. for any time not exceeding three years ;" and we contend that there is nothing in its phraseology which requires the second crime to have been committed after the first conviction. By recurring to other statutes, inflicting an increased punishment for a second offence, it will be seen that this was the sense of the Legislature. In cases where they intended that a conviction should precede the second offence they have said so. (1 *R. L.* 409, s. 5.) The 9th section of the same statute contains a provision worded like the one under consideration. Why should the Legislature express themselves in these two different ways in the same statute, unless they intended that the two phrases should have a different effect ? When they intend that the conviction shall be a part of the crime, they say so.

ALBANY,
October, 1824.The People
v.
Butler.

C. P. Kirkland & J. A. Spencer, for the prisoner. The act should be construed according to its spirit and intent, which undoubtedly was, that the conviction should precede the second offence. The mischief was a want of reformation by the first punishment. The conviction was intended as evidence that the mild corrective for one offence had failed of its effect. The object can be attained in no other way than by waiting for the effect of the first punishment. Had the Legislature intended otherwise, it would have been easy to say, in terms, that a conviction for two offences shall subject to the punishment. Construe the act as contended for, by Mr. Attorney General, and a first and second indictment and conviction on the same day for two successive offences before committed, would make out the state prison offence. Two petit larcenies are to be punished in the state prison, or county gaol, at the election of the public prosecutor. The fate of the prisoner will depend upon the question whether both offences are charged in the same, or separate indictments. We are without any direct authority upon this question; but it will be perceived that the revisors, in the marginal abstract of the two sections quoted by Mr. Attorney General, have put the same construction upon both. Though the prisoner comes within the general language of the statute, yet it is well established that this is to be controlled by the intent of the Legislature. It is the same as if they had declared that he should be punished in the state prison, for a *second offence* of the same kind. The same construction may be given to both cases. The latter has received the construction for which we contend. (*Jac. L. D. Convict*, 1. 1 *Hawk. ch. 40, s. 3.*) The first conviction should be, accordingly, stated in the indictment, and shewn to have preceded the second offence. (*id.*) *Dyer*, 323 *b.* states a case much like the present. The language of the statute, in that case, was, "*for a second offence, or second conviction,*" as it appears from the reasoning of the Court.

Both these convictions are for a similar offence. The moral turpitude is the the same in both. Yet one, it is said, must be punished in the county, the other in the state pris-

ALBANY,
October, 1824.

The People
v.
Butler.

on. The provision, under consideration, was omitted in the revision of 1813; but was made in 1819 to supply the deficiency. This, probably, arose from observing that petit larcenies were increasing in community, in consequence of the trifling punishment which followed. Can there be a doubt that the Legislature intended that the culprit should first hear the monitory voice of the law, before the heavier doom should be announced? The statute goes upon the sound maxim, that if gentle means will not avail, the more severe punishment shall be applied.

[WOODWORTH, J: Another consequence of the construction contended for by Mr. Attorney would be, that of two crimes, one committed now, and one six months hence, the punishment might be the greater for the first offence. To effect this, all you have to do is to indict and convict first for the second offence, and connect this with the first by a subsequent indictment and conviction. The offence which argues the greatest depravity receives in such a case the slightest punishment.]

Talcott, (Attorney General) in reply. It is conceded that the Legislature have power to punish, in the manner called for by a literal construction of this act; or that they may disregard the relative depravity of crimes in the manner stated by his Honor. So they may, at their pleasure, require a conviction to precede the second offence, before they demand the enhanced punishment. The case has been argued for the prisoner, as if conviction was the measure of guilt. Not so. It is only the evidence of it. No matter, then, whether the conviction be for the first or the second offence. The enhanced punishment is not for a single offence, in the case stated from the bench; but in all the cases supposed, it is for a series of offences, betraying a hardness and depravity in guilt, whether the second conviction be for the first or second offence. My construction, then, is not to be impugned because it works an unequal distribution of retributive justice. The act goes upon a disposition to repeat offences, which is the same whether before or after a conviction. The argument, that the punishment is at the

option of the prosecutor, proves too much. It would go against all punishments for a second offence, whether before or after conviction for the first ; for, in both cases, is the prosecutor to choose whether he will avail himself of the first conviction. In either case, he may omit it in the indictment ; and a punishment as for the single offence follows : so that, to follow up the argument, this Court must legislate all the like statutes out of existence.

ALBANY,
October, 1824.

The People
v.
Butler.

This statute does not give room to apply the authorities cited upon the other side. I agree that where there is a doubt whether the Legislature may not have intended that the offence should be committed after a conviction, the benign construction shall prevail. When it speaks of a second offence, it shall accordingly be held to mean an offence after a conviction. But here the statute is a *second time*, not a *second offence*. The offences are no otherwise named than to designate the crime ; not a succession of trial and conviction. Your honors are asked to insert a clause to this effect, because it is done in some other acts. But there is no more to require this than there is for putting in any reasonable clause in any other act. If absurd consequences follow its omission, the Court will lean against them. But, upon what principle can it be maintained that the Legislature have left the act to be departed from in respect to its plain provisions ?

Curia, per SAVAGE, Ch. J. The language of this statute, upon which we are asked to put a construction, has prevailed in various acts, through a series of revisals, and in relation to different offences. The statutes providing for the punishment of second offences, are worded differently ; some of them declaring, " that every person who shall be a second time duly convicted or attainted of any of the said felonies committed after the said first conviction ;" (*act of 26th March, 1796, 3 Greenleaf, 160, s. 2 ;*) sometimes, " shall be a second time, or oftener, duly convicted, or attainted," &c. (*id. s. 4.*)

Similar provisions passed into the act of 21st March, 1801, (1 K. & R. 254, s. 4-5) and the act of the 19th March, 1813, (1 R. L. 409, 410, s. 5 & 13.)

ALBANY,
October, 1824.

Nichols

Doty,

A second offence of petit larceny not being provided for in the revision of 1813, the Legislature, in 1819, adopted the phraseology which had provided for this case in the old revisions. This act of 1819 is the one under consideration.

We think the difference of phraseology in these several statutes was entirely accidental ; that the Legislature meant the same thing in each, which is, that a conviction shall precede the second offence. The reasonable construction is given by *Hawkins*. (*P. C. ch. 40, s. 3*, and *Jac. L. D. tit. Convict, 1*) to which we were referred by the prisoner's counsel, where the rule is thus laid down—"When a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; for the gentler method shall first be tried, which, perhaps, may prove effectual."

The prisoner was sentenced to the county gaol of *Oneida* for 6 months.

Rule accordingly.

NICHOLS against DOTY.

The fees of
a witness at-
tending from a
foreign state
are 50 cents a
day.

D. RUSSELL, moved for a re-taxation of costs. A town clerk, from the state of *Vermont*, attended the trial ; and the only question was whether he should be allowed 25 or 50 cents a day. *Russell* said that he was not a witness attending from a foreign county, within the act, (*2 R. L. 29*) and was, therefore, entitled to but 25 cents,

J. Crary, contra.

Curia. The witness is entitled to 50 cents per day, to be computed from the time he left home.

Rule accordingly.

ALBANY,
October, 1824.Chamberlin
v.
Day.CHAMBERLIN *against* DAY.

CHAMBERLIN obtained judgment in this Court against *Day*, for \$103.61, at *August* term, 1824, which was assigned by *Chamberlin* to *Wiley*, for a valuable consideration paid, without any notice or information, that *Day* had purchased a judgment against *Chamberlin*, nor had *Chamberlin* any notice or information to this effect, at the time of the assignment. A *fi. fa.* had issued upon the judgment in favour of *Chamberlin*, upon which the Sheriff had levied \$30. On the other hand, one *Gold* had recovered a judgment in this Court, against *Chamberlin*, in *October* term, 1823, for \$172.72, which *Gold*, for a valuable consideration paid, sold and assigned to *Day*, on the 14th *June*, 1824.

It was now moved that the Deputy be ordered to pay back the \$30 to *Day*, and that the residue of *Chamberlin's* judgment be set off against the judgment assigned to *Day*,

E. S. Lee, for the motion,

W. W. Brown, contra.

Curia. *Wiley* took the assignment subject to all the equities actually existing against *Chamberlin's* judgment at the time of the assignment. Want of notice will not protect against these. *Day* had purchased and took an assignment of *Gold's* judgment, before *Chamberlin's* was assigned; and having a right to this set off prior to that assignment, it did not divest that right. The motion must be granted.

Rule accordingly.

An assignee of a chose in action takes it subject to all equities existing against it at the time of the assignment, though he have no notice of such equity.

Where *W* purchased a judgment of *C*, against *D*, without notice that *D* had previously purchased a judgment against *C*, held, that *D* might, notwithstanding, set off his judgment so purchased, against the judgment in favour of *C*.

Assignee of a judgment against the plaintiff, allowed, on motion, to set it off against the judgment in favour of the plaintiff against the assignee.

ALBANY,
October, 1824.

Blue
v.
Stout.

GRANT *against* ROOT and HOBBIE.

A judgment of this court is perfect after 4 days from the time of entering a rule for judgment, tho' the record be not filed.

After this, a commissioner has not the power to order a stay of proceedings, with a view to a motion for a new trial;

But where the practice, on this head, was mistaken by the attorney, the court set aside the proceedings, and granted liberty to move for a new trial, on payment of costs.

THE defendants having obtained a verdict, entered their rule for judgment, and, after the lapse of four days thereafter, taxed their costs; and then, before the record was filed, the plaintiff obtained an order to stay proceedings, from the Recorder of *Albany*, with a view to move for a new trial, on account of newly discovered evidence; and on a motion by *C. H. Ruggles*, which was opposed by *J. Sudam*, one question was, whether this order was regular; and

SUTHERLAND, J. said, the judgment was perfect after 4 days, though the record was not filed; so that no order could be granted by a single Judge, or commissioner; to which the other Justices agreed; but,

Per Curiam. As here has been a misapprehension of the practice, by the plaintiff's attorney, and he has proceeded in good faith, and as there is probable cause for a new trial, we set aside the defendants' proceedings, on payment of costs, and let the plaintiff in to move for a new trial, in the same manner as if he had proceeded regularly, for that purpose, in the first instance.

Rule accordingly.

BLUE *against* STOUT and FISHER.

Special bail cannot object to an amendment of the *ac etiam*.

A MOTION was made, in this cause, to amend the *ac etiam* of the *capias ad respondendum*, which the attorney for the plaintiff, by mistake, issued in covenant, when it should have been in assumpsit.

This was opposed, because special bail had been put in.

S. M. Perkins, for the motion.

Dayton & Woods, contra.

Curia. The bail have no right to object to the amendment.(a) The motion must be granted, on payment of costs.

ALBANY,
October, 1824.
Ex parte Hill.

Rule accordingly.

(a) *Vid. Christie v. Walker*, 1 Bingham, 68.

Ex parte HILL.

J. A. SPENCER, moved for a mandamus to the Judges of the Court of Common Pleas of *Madison* county, commanding them to vacate a rule setting aside a verdict for irregularity, in an action between *Hill*, plaintiff, and one *Clark*, defendant. The verdict was for *Hill*; and the Court set it aside, on *Clark's* motion, because one of the jurors, during the trial, left the box, without permission of the parties or the Court, went out of doors, and was absent some minutes, returned and took his seat, and joined in the verdict against the defendant. Neither of the parties knew of his absence, till he had been gone some time; but no testimony was given to the jury while he was gone; and he spoke with no one, except to tell the constable, who came after him and brought him back, that he was one of the jury.

If a juror leave his seat for a short time, without the knowledge of the court or parties, but no testimony is given during his absence, and he holds communication with no one on the subject of the cause; though this be a contempt of court, yet it does not avoid the verdict.

J. Platt, contra.

Curia. It is the settled doctrine, that though such conduct as this is a contempt of the Court; yet it is not a ground for avoiding the verdict. The cases on this subject are all collected by the Reporter, in a note to *Smith v. Thompson*, (1 *Cowen's Rep.* 221.) Let an alternative mandamus issue.

Rule accordingly.

ALBANY,
October, 1824.

JACKSON
v.
TRAVIS.

JACKSON, *ex dem.* SMITH, *against* STILES, COMBS & GARRISON, tenants.

Where 2 defendants are sued jointly in ejectment, they have no right to enter into separate consent rules in the name of each alone.

A DECLARATION having been served on *Combs & Garrison*, the notice from the casual ejector being directed to them jointly, they separately retained an attorney to appear, and he tendered separate consent rules to the attorney for the plaintiff, which mentioned one defendant only as being made defendant, without stating that he was impleaded with the other. The plaintiff's attorney refused to accept such a consent rule, and took a default, which

J. Maynard, now moved to set aside for irregularity.

A. Gibbs, contra.

Curia. The plaintiff is regular. The consent rule should have been in the name of both defendants.

Motion denied.

JACKSON, *ex dem.* PALMER and others, *against* TRAVIS.

Several demises added in ejectment on payment of costs, it appearing that the lessors sought to be added had a subsisting legal title.

L. H. PALMER, for the plaintiff, moved to amend the declaration, by adding demises from several lessors. The attorney for the plaintiff made an affidavit, on which the motion was founded, "that he is informed, and believes, that the title to one third of the premises in question had been vested in the lessors sought to be added, for the recovery of which premises it became necessary to add demises from them."

This was opposed by an affidavit on the part of the defendant, that the plaintiff's attorney had acknowledged that the claim of the lessors (who were sought to be added) was merely under a deed of trust, for the benefit of the present lessors, and that he believed that, as to all of them except one, they had not assented to the use of their names as lessors; that from conversations with the plaintiff's attorney, he en-

tertained no doubt that the beneficial interest was now vested in the present lessors ; and that granting the motion would impose very great additional difficulty in making out the defence.

ALBANY,
October, 1824.

The People
v.
Richardson.

H. A. Othout, contra.

Curia. The motion must be granted. We will always allow an amendment, by adding new demises, where it appears that the lessors sought to be added have a subsisting legal title to the premises in question, on payment of costs.

Rule accordingly.

THE PEOPLE *against* RICHARDSON, Clerk of WAYNE county.

TALCOTT, (Attorney General) having obtained leave of the Court, at a former term, to file an information, in the nature of a *quo warranto*, against the defendant, to try his right to the Clerkship of the county of *Wayne*, and having filed such information, now moved for a rule that the defendant enter an appearance, and plead in 20 days after service of a copy of the information, and the rule to be made, or that the Attorney General have leave to enter an appearance for him, and take judgment by *nil dicit*.

On filing an information in nature of a *quo warranto*, the court granted a rule that defendant appear and plead in 20 days after service of a copy of the information, and notice of the rule, or that the attorney general have leave to enter an appearance for him, and take judgment by *nil dicit*.

Curia. This not coming within the rules which apply to ordinary cases, and warrant proceedings of course, we think a special application proper, and grant the rule as applied for.

Rule accordingly.

ALBANY,
October, 1824.

WOOLSEY *against* CAMP.

Ex parte Com.
Council of Al-
bany.

THE verdict being for the defendant, and a case being made presenting several questions of law, as to the decisions of the Judge at *nisi prius* ;

A case cannot be turned into a special verdict, unless there be a stipulation to this effect at the trial.

S. A. Foot, on an affidavit that the defendant's counsel omitted, by mistake, at the trial, either to take a bill of exceptions upon the points of law arising and decided there, or to request the Circuit Judge that the case might be turned into a bill of exceptions, or a special verdict ; and that he was desirous to bring error, if the judgment should be against him ; moved for leave to turn the case into a bill of exceptions.

J. Platt, contra.

Curia. This is never done, unless there is a stipulation to that effect at the trial. It is almost a matter of course for a Circuit Judge to grant leave to turn a contemplated case into a special verdict or bill of exceptions, if requested by either party, at the trial ; but this should appear, by stipulation, in the case, or in some other way. A bill of exceptions, or special verdict, is a part of the business of the trial ; and if not sought for in any way there, it cannot be obtained afterwards.

Motion denied.

Ex parte THE COMMON COUNCIL OF ALBANY.

A resolution of the common council of the city of Albany, that certain sums should be

raised for the support of the poor, and for the city night watch and lamps, and to pay the interest of the city funded debt, &c. is imperative upon the board of supervisors of the city and county of Albany, who are bound to raise such sums upon the city.

They have no right to refuse, on the ground that large sums of money, heretofore raised for these purposes, have been misapplied.

The duties of the board of supervisors, in raising moneys on vote of towns to destroy noxious animals, &c. (2 R. L. 132, s. 15) and on the certificate of commissioners of highways, to improve roads, (2 R. L. 280, s. 31) placed on the same footing by *A. Spencer*, arg. and adverted to by the court, in delivering their opinion, as illustrating the main question.

It seems, therefore, that in these and the like cases, the duties of the board of supervisors, in raising money, are merely ministerial.

them to assess certain taxes on the city of *Albany*, pursuant to a resolution of the Common Council of that city.

ALBANY,
October, 1824.

Ex parte Com.
Council of Al-
bany.

It appeared by the papers presented to the Court, that on the 4th October, 1824, the Common Council resolved that there be raised, by tax upon the citizens of that city, \$8000, to pay the interest on the city funded debt ; \$8000 for the payment of the night watch, and city lamps ; and \$10,000 for the support of the poor the ensuing year. A certified copy of this resolution was furnished to the board of supervisors of the county of *Albany*, at their ensuing meeting, on the 20th of October, 1824.

The supervisors referred this resolution to a committee of their body, who examined the books of the city chamberlain, and reported that, as it appeared from these, more than \$26,000 had been raised, beyond what had been expended in the objects specified in the resolution, from 1817 to 1823 ; and they recommended a resolution, which was adopted by the board, that \$8000 be raised, to pay the interest on the funded debt ; \$6000 for the payment of the night watch, and city lamps ; and \$8000 for the support of the poor.

He said the board of supervisors refused to comply with the full extent of the resolution, upon the ground that they were invested with a sound discretion, and were interposed, by the general act under which they convened, between the Common Council and the citizens, for the protection of the latter against the abuse of trust by the former. The act concerning the city of *Albany*, (2 R. L. 465, s. 5) after conferring other powers upon the Common Council, enacts, " that the Common Council shall yearly determine the sum necessary to be raised by tax for the support and maintenance of the poor of the said city for the ensuing year, and the supervisors of the city and county of *Albany* being served with a copy of the resolution of the said Common Council directing such sum, shall cause the same to be raised, assessed and collected, according to law ; and such moneys, when collected by tax, shall be paid to the chamberlain of the said city, and shall be drawn for and applied under the direction of the Common Council." The 21st section of the same act, (2 R. L. 475) enacts, " that the Common Council shall and may, from

ALBANY,
October, 1824.

Ex parte Com.
Council of Al-
bany.

year to year, cause a tax, not exceeding \$15,000, to be assessed, collected, and paid, in the same manner as the other contingent expenses of the said county are assessed, collected and paid, for defraying the expenses of supporting the night watch, and lighting the lamps within the said city; and the chamberlain shall annually publish a statement of the moneys received and expended by virtue of this section, in one or more of the publick papers printed in the said city." As we read these provisions, the board of supervisors have no discretion. The city of *Albany* (containing 5 wards) is, by law, to elect a supervisor for each ward. The several towns of the county, (8 in number) are required to elect a supervisor for each. Of these, forming the county board, a majority, being non-residents of the city, claim the right to protect the citizens of *Albany*, who have no voice in their election, against the Common Council, who are the immediate representatives of the citizens, and may be deposed by them for abusing their trust. To suppose that the legislature ever meant to vest a discretionary power, such as is claimed here by the board of supervisors, would be absurd. The power of refusing is as injurious as the right of imposing taxes, by persons who, or whose constituents, have no manner of interest in them, when raised. What becomes of the city interests, while this conflict is going forward? The object in convening the whole supervisors of the county, to provide for levying taxes, is, that the state, county, city and town taxes, may all be levied by a single operation. Their powers, in relation to the city, are no more than are conferred relative to the towns, by the second section of the act for defraying the publick and necessary charges in the respective counties of the state, (2 R. L. 137) where they are enjoined to allow certain accounts against the county; or, (which more nearly resembles the present case) by section 15 of the act relative to the duties and privileges of towns, (2 R. L. 132) where they are required to raise certain sums voted by the towns, to be levied upon themselves, and expended in the destruction of wolves, or other noxious animals. Though left to the towns exclusively to fix the amount, a return is to be made to the general board, who are to levy the tax voted.

The words of the various acts, on these and the like subjects, are mandatory. The board have nothing to do with the propriety or impropriety of the levy. The tax is to be collected in the same manner as the contingent charges of the county. Here is no charge of misapplication. It is not pretended that one cent of the \$26,000 has been devoted to any other than city purposes.

ALBANY,
October, 1824.

Ex parte Com,
Council of Albany.

A. Van Vechten, contra. The question is, whether the board of supervisors have a right to see that the moneys already raised by the Common Council, for certain specified objects, have been properly appropriated, before they are compellable to raise more. They had already raised more than enough to make up the difference between the sum now asked for, and the sum levied by the board. When the statute says that moneys shall be raised for a specifick object, and they have been raised and not applied, does it mean that further moneys shall be raised for the same object, when there is enough for this purpose in the treasury? Shall this be tolerated? The interposition of the Court is sought upon the supposition that the board have neglected their duty, in refusing to act; and I grant that, if it appeared necessary to raise these moneys, a refusal would be such neglect. But when it appears there is enough on hand, the object cannot be to meet the wants of the city. It is said, to be sure, that "with this the board have nothing to do. The money is gone. There is none in the treasury. No matter what the purpose to which it has been applied, if for city purposes. It is enough that we are to be turned out of office, if we conduct ourselves improperly. It is enough that it has not been applied to the proper objects for which it was intended." Is it so? The legislature have limited the corporation to a certain sum, for several of these objects. Here, at least, their power is not unlimited. But the law implies a discretion, when it orders money to be raised for a specific purpose. It is plain that if the Common Council raise a surplus, one year for one object, it should be added to the corresponding fund of the next year. Otherwise the limitation would be none at all. It might be evaded at pleasure. When it is

ALBANY,
October, 1824.

Ex parte Com.
Council of Al-
bany.

plainly seen that the monies have been applied to the wrong object; the supervisors have a right to interfere, upon the same principle. The expenditure from the respective funds, after 1817, falls much short of the monies raised; and the balance should have been carried over to the next year, to the credit of those funds. After raising nearly the sum required, the supervisors find a large amount yet unexpended. "No," say the Common Council, "we are to command, and you are to obey." This depends on the question whether the law sanctions the demand. Shall the board raise \$20,000 when only \$10,000 are requisite? Suppose a demand of \$15,000 for the night watch, and the board find that \$10,000 only are necessary; and the parties come here; would this Court sanction and enforce the demand? The refusal to grant would be no breach of duty; and, consequently, no violation of the law. It is said the monies have not been misapplied; but they have. If raised for a specific object, and not used to answer it, but for another purpose, this is the very definition of the term misapplication. The corporation have power, because they have the means to ascertain what sums are necessary to be raised; but does this authorize them to require twice that sum? It is asked, what have the town supervisors to do with the city? I ask in turn, what have the city supervisors to do with the towns? are they all here as mere puppets, to dance as the Common Council shall play the wires? They have power to inquire, and ascertain if the levy is necessary; and when they find it not to be so, can they conscientiously raise it? Suppose the Common Council corrupt, and ordering large sums to be raised, when they have plenty of money already; are the supervisors bound to obey the *ex voto* of such a body? Are they not intended as a check? They are the general guardians of the county. Where is the evidence that this \$26,000 has been duly expended, or expended at all? If it has been wrongfully expended, are not the Court bound to notice the misapplication? Or, if on hand, to say, "you ask for money, when you have plenty already?"

Every application for a mandamus is addressed to the sound discretion of this Court; and when right and wrong

are so mixed as to render the right doubtful, they will refuse to interfere. We protest against raising this money, when there is enough on hand. Whose fault is it that inconveniences are to arise for the want of it, if it has been misapplied? That of the Common Council. They are to answer for it. Does it lie with them to ask, "What is to become of the city unless you raise the whole sum demanded?" They should apply to the legislature for leave to raise money for other objects. The law should be the only measure of expenditure; otherwise, you give an unlimited discretion.

ALBANY,
October, 1824.

Ex parte Com.
Council of Al-
bany.

Spencer, in reply. On the principle claimed here, the supervisors may refuse any thing, imposed upon them as a duty by any of the statutes. Indeed, to have been consistent, they should have adjudged that we wanted nothing, and refused wholly to comply with our resolution. We lie completely at their mercy. We cannot tax our own constituents without their consent. This would result from their having a discretion. This Court, according to *The People v. The Supervisors of Albany*, (12 John. 414) can exercise no control over them. When once passed upon, the question is *res judicata*.

The amount of the argument on the other side is, that we have abused our power—not that the board have any power to refuse the levy requested. But we say again, the office of the supervisors is merely ministerial. There is no restraint upon us as to the amount of monies to be raised for the support of the poor; though we are confined to \$15,000 for the night watch, &c. Had we gone beyond the latter sum, we should have exceeded our power; and the act would not have been binding. There is no pretence that we have not acted within the limits of our jurisdiction. But it is said, that this \$28,000 should have been applied to the specific object of the resolution upon which it was raised. That I deny. Any money in the treasury may be applied to any other demands against the corporation. The means of raising money for certain objects are specified; and none other can be resorted to; but it is not material to the city how the monies raised are applied, if it be for their purposes. It will

ALBANY,
October, 1824.

Ex parte Com.
Council of Al-
bany.

be intended that the monies have been so applied ; that the officers of the city have done their duty. But suppose it otherwise ; suppose a previous violation of duty ; is this a reason why the city should not be lighted, or the poor maintained for the time to come ? Nor will the Court intend that we can borrow the money which is wanted.

No authority is cited to support the powers of the board to re-judge this question. The language of every act, imposing the duty to raise money upon the board of supervisors, is at war with this construction. Such are the provisions, already adverted to, and such the language of the whole act to which I before referred the Court, (2 R. L. 127,) touching the general and special powers of the board. It requires them to *assess, levy, &c.* There is also a provision in the act to regulate highways (2 R. L. 280, s. 31,) much like the one under consideration. The board are *required* to raise such sum, not exceeding \$250, as shall be ordered by the commissioners of highways of a town.

SUTHERLAND, J. delivered the opinion of the Court, to the following effect. The act under which the Common Council made this order, so far as form is concerned, has been strictly complied with ; and the only question submitted to us relates to their power. This law gives, in terms, full authority to do precisely what they have done ; to order the levying of these monies by the board of supervisors. Then have the latter any discretion, whether they shall comply with the order ? The provision as to raising money for the support of the poor is couched in very positive language. It is, *that the Common Council shall yearly determine the sum necessary to be raised for this purpose ; and the supervisors, being served with a copy of the corporate resolution, " shall cause the same to be raised, assessed and collected according to law."* Here a power is given without limitation or control, to direct such sums to be raised as the Council may think proper ; and it is imperiously made the duty of the supervisors to raise that sum. The provision as to the city watch confers the power in the same terms, limiting it to the compass of \$15,000 per annum. This, by the 21st sec-

tion, is to be raised in the same manner. Both provisions are equally imperative, in terms, upon the supervisors. They, however, contend that they have a discretion in this business ; that they are not mere ministerial officers ; that they are authorized to judge whether the sums, heretofore raised for specific objects, have been properly expended ; that otherwise they might be made the instruments of oppression ; and they show by extracts from the books of the Common Council, that large sums heretofore raised for specific objects have not been expended for these purposes. From the statement made by the committee, in their report, this would seem to be so, to the amount of 20 or \$30,000. They insist on a power, implied by law, to guard against such excesses ; and demand that this sum should be carried to the credit of the city in account with their officers. This may all be very proper ; but I am satisfied that no such discretion is conferred by the law, either in its terms or the general provisions and policy of the act, under which the board of supervisors proceed. The contrary is rather to be implied from various provisions similar to those under consideration, to which we were referred at the bar. The council, like the legislature, are responsible to their constituents only for the manner in which they discharge these duties, so long as they act within the scope of their authority. The course is for the former to take the remedy into their own hands ; and remove their public agents, if they have abused their authority, which we do not pretend to say is the case. The statute is imperative upon the supervisors. They cannot exercise the least control, in determining the amount to be raised. The sums sought to be levied are for the use of the citizens of *Albany* ; to be paid by them. We grant an alternative mandamus.

ALBANY,
October, 1824.

Ex parte Com.
Council of Albany.

Rule accordingly.

ALBANY,
October, 1824.

The People
v.
Justices of N.
Y. Mar. Court.

THE PEOPLE, *ex rel.* GLANDER & PERSON,
against

THE JUSTICES OF THE MARINE COURT of the city of NEW-YORK.

The act for the relief of debtors with respect to the imprisonment of their persons (1 R. L. 348, s. 4) extends to debtors in execution on judgments founded on wrongs as well as on contracts, *e. g.* on an assault and battery.

ON shewing cause why a mandamus should not issue, it appeared that the relators were sued in the Marine Court for an assault and battery, to which they severally pleaded not guilty; judgment passed against them, and they were committed to gaol on a *capias ad satisfaciendum* for \$160 damages and costs; that, on the 23d September, 1824, they respectively petitioned the Marine Court for a discharge, under the "act for the relief of debtors with respect to the imprisonment of their persons," passed April 9th, 1813; (1 R. L. 348) which was opposed, because the judgment was founded on a *wrong*—not on *contract*. Upon this ground, the prisoners were remanded; and the hearing of the application adjourned.

J. E. Lovett, for the defendants, said the word "*debt*," used in the statute, applies to a judgment founded upon contract. The statute was passed for the benefit of the unfortunate debtor, not for the relief of the guilty. The cases of *Jackson v. Smith*, (5 John. Rep. 115,) *The King v. Wakefield*, (13 East, 189,) and *Ex parte Benj. Lawrence*, (1 B. & P. 477) do not apply to the present question.

J. McKown, for the relators. The words of the act are too broad to be misunderstood. To warrant the interference of the Court, it is only necessary that the applicant should be charged in execution for a sum of money. *Strong v. While*, (9 John. 161) has no application; for the act of 1811 was expressly limited to the case of judgments upon contract. In *Jackson v. Smith*, (5 John. Rep. 117) the Court leave it strongly to be implied, that if the defendant had been in actual custody upon a conviction for the contempt, the Common Pleas would have been right in discharging.

Curia. The question now is the same as it was upon the motion for a rule to shew cause ; and we see no reason to change the opinion we then expressed.

ALBANY,
October, 1824.

Mirwan

Ingersol.

Rule absolute.

MIRWAN *against* INGERSOL.

ON certiorari to a Justice's Court ; the plaintiff assigned errors ; and the defendant pleaded a special plea in bar, of accord and satisfaction, to which the plaintiff replied, taking issue. At the last *Monroe* Circuit, the cause coming on to be tried, the Circuit Judge decided that the defendant held the affirmative. And, he not being ready with his proof, his counsel declined appearing, and the cause was called, and the jury impannelled as upon an inquest by default. While the counsel for the plaintiff was engaged in drawing a special verdict, the defendant's witness appeared, and his counsel then asked leave to appear, and try the cause, stating that he could prove the truth of his plea. This was denied by the Judge ; and the plaintiff's counsel hastily drew a special verdict in these words : " And the jury find that *Thomas Ingersol* does not appear nor offer any evidence to prove the allegations contained in his plea." This was received and entered as the verdict of the jury ; and the plaintiff afterwards proceeded, without submitting the verdict to this Court, to tax his costs, perfect his judgment, and issue his execution.

The defendant may appear at the circuit, after the jury are impannelled for an inquest by default.

A special verdict, finding that the defendant does not appear, nor offer any evidence in support of his plea, is a nullity.

The plaintiff cannot take judgment, of course, upon a special verdict, but it should be on motion in court.

A motion was now made, in behalf of the defendant, to set aside the verdict and all subsequent proceedings for irregularity, on these ground, among others, viz. 1. That the defendant should have been suffered to appear. 2. That the verdict was void. 3. That, at any rate, judgment could not be taken upon the verdict, without a special motion to this Court. And *Com. Dig. pleader*, (S. 21, 22) was cited to shew the verdict void.

D. D. Barnard, for the motion.

ALBANY,
October, 1824.

Gay
v.
Rogers.

R. Beach, contra.

Curia. The objections are all well taken ; and the motion must be granted.

Rule accordingly.

MACAULEY against STERNBURGH.

On reversing a judgment upon error, the plaintiff is entitled to costs

And he may perfect his judgment and issue execution on them immediately, without waiting for the final event upon a venire de novo awarded.

In the *Herkimer* Common Pleas, the judgment was for the defendant. And, on error to this Court, it was reversed, and at the last *October* term a venire *de novo* was awarded to the Circuit ; but the plaintiff, without waiting for the event of the cause upon the trial, taxed his costs and perfected his judgment of reversal, which it was now moved to set aside as premature and irregular.

O. G. Otis, for the motion.

A. Conkling, contra.

Curia. The plaintiff in error was not bound to wait the event of the suit upon the venire *de novo*. When a judgment is reversed on error, the plaintiff is entitled to recover his costs, and may perfect his judgment immediately and issue execution as in other cases.

Motion denied.

GAY against ROGERS and WAIT.

An attorney, or other officer of the court is never privileged from arrest, when sued with another, though during the actual sitting of the court, and during his attendance at court,

THE defendant, *Wait*, an attorney and counsellor of this Court, attending at this term, was arrested on a bailable *capias*, against him and *Rogers*, a common person.

S. A. Foot, moved that *Wait* be discharged.

S. Stevens, contra, said he could not have his privilege, being sued with another. He cited *Tiffany v. Driggs & Lynch*, (13 *John*. 252.

Foot. That case was decided on common law grounds. But the statute, (1 R. L. 418, s. 12) exempts the profession from arrest, generally, during term.

ALBANY,
October, 1824.

Avery
v.
Curtiss.

Curia. That statute circumscribes the common law privilege to actual term time, during which it is no greater than it was before the statute. Officers of the Court were never privileged, when sued with others. The reasoning of the Court in *Tiffany v. Driggs*, as to the statute, (1 R. L. 387) applies, therefore, to the act, (1 R. L. 418, s. 12) upon which the defendant moves,

Motion denied.

AVERY and AVERY against CURTISS and WEED.

ACTION, on a joint and several promissory note, made by the defendants, who pleaded separately the general issue. On the trial, the verdict was for the plaintiff, against *Curtiss*, and for *Weed*, against the plaintiff, upon which *Weed's* attorney entered a rule for judgment, in his favour, with costs, which it was now moved to set aside, on the authority of the case, *Ex parte E. Nelson*, (1 Cowen's Rep. 422.)

In an action arising *ex contractu*, against several defendants, some of whom succeed, and others have a verdict against them, the former are not entitled to costs.

J. Maynard, for the motion.

A. Gibbs, contra.

Curia. This case comes within the second section of the general statute concerning costs, (1 R. L. 343) the construction of which, in reference to this question, was considered in the case, *Ex parte Nelson*, (1 Cowen's Rep. 417). Though the question was not directly decided, the reasoning of that case applies. The course upon the English statute, which is worded like our second section, has always been to deny costs to one whose co-defendants are convicted, though a verdict pass for him. The 10th section, (1 R. L. 345) applies to certain actions arising *ex delicto* only. The motion must be granted.

Motion granted.

ALBANY,
October, 1824.

Lent
v.
Butler.

LENT against BUTLER.

In slander, the defendant gave notice with his plea, that he would prove the words true; which plea he afterwards moved to withdraw, on an affidavit that the notice was given in good faith; motion refused, unless he would swear to the falsity of the notice.

SLANDER, for charging the plaintiff with stealing goods. Plea, the general issue, with notice that the defendant, on the trial, would prove the truth of the words spoken, in his justification. And now,

C. H. Ruggles, moved to withdraw this notice, and to substitute another, which he produced, and which set up the statute of limitations, with certain matters which went to mitigate the damages. He read the defendant's affidavit, stating that the first notice was interposed in good faith, and under the advice of counsel; that when it was delivered, he verily believed he should be able to prove the material facts stated in it; that *W. N. Palmer*, formerly of *Poughkeepsie*, was the witness upon whom he placed the principal reliance for this purpose; but that he had left the state, with his family, without the defendant's knowledge; and, as he was informed by the witness' friends, had gone to reside in some part of *South America*, and would not return to this country.

He supposed the gentleman opposed to him, (*Mr. J. Tallmadge*) would take the same ground here as he did in *Clinton v. Mitchell*, (3 *John. Rep.*, 44) and insist that the notice should not be withdrawn till its falsity was acknowledged by the defendant. The case, however, was distinguishable. It did not, in that case, as in this, appear that the notice was given in good faith; which is the reason assigned by the Court, for refusing the rule.

J. Tallmadge, contra, did rely upon that case, and should contend for its doctrine, without the qualification alluded to. The defendant has followed up his slander by a gross libel upon the record, and which the plaintiff is entitled to have falsified in the same way. This must be either by the defendant's affidavit of its falsity, or the verdict of a jury, giving those aggravated damages which such a notice called for.

The Court were clear with the counsel for the plaintiff, that, for these reasons, the motion must be denied; and WOODWORTH, J. said, that this application was even a still farther aggravation of the slander; for the defendant says, in his affidavit, "the charge which I advanced against the plaintiff is true; but by reason of *Palmer's* absence, alone, I am, unfortunately, not able to prove it."

ALBANY,
October, 1824.

Ex parte
Johnson.

Motion denied.

Ex parte JOHNSON.

PHEBE JOHNSON petitioned the Judges of the Court, of Common Pleas of *Montgomery* county, that such proceedings might be had against ———, a Justice of the Peace of that county, as the constitution and laws of this state require, for a false return to a writ of *certiorari*, and for keeping his office in a grog or dram shop, setting forth the particulars, and verifying the petition by her affidavit. The petition was presented to the Judges the 12th October, 1824, at which time they made a rule, that the prayer of the petition be denied, without hearing the merits.

Under the 7th section of the 4th article of the constitution, the judges of the common pleas have a discretion whether they will hear a charge, preferred against a justice of the peace; and the supreme court will not interfere with its exercise.

P. Brooks now moved for a mandamus, commanding the Judges to take cognizance of this matter; but

Per Curiam. The whole was a mere matter of discretion with the Common Pleas. Under the constitution, (art. 4, s. 7) they are the sole judges whether they will notice the charges preferred or not. They hold a constitutional power, with which we will not interfere. Besides, it is a sufficient answer to that part of the case which complains of a false return, that it is more properly triable in another form.

Motion denied.

ALBANY,
October, 1824.

Ex parte
Kellogg.

Ex parte KELLOGG.

Though on appeal, pursuant to the statute, (*sess.* 47, *ch.* 238, *s.* 36, 37) the justice do not file his return till after the first day of the term of the common pleas next after the appeal; they ought not to quash the return, but proceed thereon when the return comes in.

The fact, that the costs were paid to the justice, need not be endorsed on the appeal bond.

KELLOGG sued *Griffin* before a Justice of the Peace of *Herkimer* county, and on the 25th August, 1824, the Justice rendered judgment for the plaintiff, of \$7.59, from which the defendant appealed, September 4th, pursuant to the act of April 12th, 1824, (*sess.* 47, *ch.* 238, *s.* 36, 37) to the next Court of Common Pleas of *Herkimer*; but it was not endorsed upon the bond given on such appeal, that the costs of the proceedings in the Court below had been paid by the appellant; and the Justice, moreover, omitted to file the return, till after the first day of the then next term of the Common Pleas; for which reasons a motion was made there to quash the return, but denied; and now,

B. D. Noxon, moved for a mandamus commanding them to do this; but,

Per Curiam. The statute is merely directory. True, if the Justice does not return on or before the first day of the next term after the appeal, it is an omission of duty; but the party is not to suffer by this. If filed at any time afterwards, he may proceed in his appeal. The statute does not require that the payment of costs should be endorsed upon the bond. If, in fact, paid, this is enough; and the contrary is not pretended.

Motion denied.

ALBANY,
October, 1824;

Jackson
v.
Rathbone.

JACKSON, *ex dem.* EDEN, *against* RATHBONE.

FOR the facts out of which the present question grew, see 2 *Comen's Rep.* 602, S. C. On referring the costs for taxation, as there mentioned, (page 604) Judge *Irving* refused to tax a new record of judgment upon the return of the writ of inquiry, and the services about entering and perfecting a new judgment; but he allowed the appropriate services for continuing down the original record remitted from the Court of Errors, with a history of the proceedings.

On executing a writ of inquiry under the statute, (1 R. L. 343, s. 3) judgment being affirmed on error, and the record being remitted, a new judgment record is not necessary; but the proceedings may be continued at the foot of the original roll.

A. Burr, moved for a re-taxation, on this ground, among others. He said the statute, (1 R. L. 144, s. 3) speaks of *inquiry, judgment*, and award of execution, for *damages*, with *costs of suit*. If no rule for judgment, and no record, there is no authority to "award execution for the damages and costs of suit."

How this is to be done. May be on separate paper, and attached to record, as in assigning breaches, *laties quoties*, &c. after judgment bond to perform covenants, or court on motion, would allow record on file to be continued, &c.

C. H. Ruggles, *contra*, insisted that there was no need of a new record. It was sufficient to continue the proceedings upon the old one.

Burr, said the statute evidently contemplated a new judgment, independent of, and distinct from the first, and, therefore, authorized a new record. This might as well be denied of a *scire facias*, or debt on judgment. The original record, when filed, is beyond the control of the attorney. It can be altered by the Clerk, only, under the direction of the Court. The new judgment should be docketed. There is no authority for this, unless there be a new record signed and filed.

Curia. A new record was unnecessary. The proceeding by inquiry might have been continued upon the record remitted from the Court of Errors; and *WOODWORTH, J.* said this did not mean taking the record from the Clerk, and continuing the history upon that. All that is necessary is,

ALBANY,
October, 1824.

Hall
v.
Rochester.

to make the proper suggestion, and give a history of the subsequent proceedings upon separate paper, and attach this to the original roll, as is done when you assign new breaches, *toties quoties*, on the record of judgment upon a bond for the performance of covenants. And SUTHERLAND, J. said, that if it were otherwise, that would be no argument in favour of a new record ; for this Court, on application, would grant leave, of course, to continue the original record in the hands of the Clerk, provided it were necessary.

Motion denied.

HALL *against* ROCHESTER, ATKINSON and CAMPBELL.

In *assumpsit* against three, on a joint and several promissory note, two pleaded that the note was fraudulently and oppressively obtained, upon which the plaintiff entered a *nolle prosequi* as to them, and took judgment by default against the third ; held, that the action was discontinued as to all.

In actions *ex contractu*, against several, unless the defence as to one go merely to his personal discharge, a *nolle prosequi* cannot be entered as to him, and the suit be continued as to another.

ASSUMPSIT, on a joint and several promissory note—payee against the makers. The first count was on the note, and the second and third were the common money counts, and an account stated. Rochester and Atkinson pleaded *non-assumpsit* ; and, to the first count, that the note was fraudulently and oppressively obtained, setting forth the particulars. Upon the receipt of this plea, the plaintiff entered a *nolle prosequi* as to them, and took a judgment by default against Atkinson, which it was now moved to set aside as irregular.

E. Pomeroy, for the motion, said the *nolle prosequi* was a discontinuance as to all the defendants. (*Noke v. Ingham*, 1 Wills. 89. *Hartness v. Thompson et al.* 5 John. Rep. 160. *Morton v. Croghan*, 20 John. Rep. 122, per Spencer, Ch. J. 1 Chit. Plead. 546. *Tidd*, 632.) The result of these authorities is, that in actions in form *ex delicto*, the plaintiff may enter a *nolle prosequi* as to one of several defendants ; but in actions *ex contractu*, unless the defence go merely to the personal discharge of one, a *nolle prosequi* cannot be entered as to one and the suit be continued as to the other, but the *nolle prosequi* discontinues the suit as to the whole. Actions *ex contractu*, against several, are joint. The plaintiff, to sustain his action, must shew a joint contract made by

all ; and a plea, by one, to the action of the writ, enures to the benefit of all the defendants. (1 *Chit. Pl.* 31, 32. *Boulter v. Ford*, 1 *Sid.* 76. *Sheriff v. Wilkes et al.* 1 *East*, 52. *Gray v. Palmer et al.* 1 *Esp. Rep.* 135.) That the note is joint and *several*, makes no difference. The plaintiff has elected to proceed against the defendants jointly ; and, for the purposes of this question, the demand must be treated as a joint one.

ALBANY,
October, 1824.

Van Lew
v.
King.

F. M. Haight, contra, said there was no direct authority for this application. In *Morton v. Croghan*, cited by the defendants' counsel, the decision is put on the ground that the defendants were all *necessarily* parties. Accordingly, per *Spencer, J.* "Where all the defendants are necessarily parties, and the plaintiff was obliged to make them parties, as in a proceeding against terre-tenants, a discontinuance as to some is a discontinuance as to all." Here the action was not *necessarily* joint. It might have been several ; and it is the same thing to the defendant (*Atkinson*) as if he, alone, had been sued.

Curia. The distinction contended for, by the defendants' counsel, is fully borne out by the cases to which he refers.

Motion granted.

VAN LEW and others against KING.

On the 8th May, 1824, the plaintiffs brought assumpsit for money had and received, against the defendant, in the New-York Common Pleas, and laid their damages at \$250. The cause was tried the 25th September, and the jury found for the plaintiff, \$38,33. The total amount of the accounts in controversy between the parties, was \$394. The plaintiff

In the court of common pleas of the city of New-York, the plaintiff has costs, tho' he recover less than \$50, if his recovery exceed \$25. And this, the

the action might have been brought before a justice of the peace.

ALBANY,
October, 1824.

Van Lew
v.
King.

procured his costs to be taxed at \$51.59, for which he took judgment; and on submitting the question to this Court, whether the plaintiff was entitled to costs in the Court below, he having recovered less than \$50, the act of *April 12th, 1824, (sess. 47, ch. 238, s. 33)* was relied upon, as denying costs.

It was said that the suit was cognizable before a Justice, the amount recovered less than \$50, and the accounts less than \$400. The words, in the 1st section of the act, "the city and county of *New-York* excepted," do not extend to the provisions of the 33d section. Several new regulations, introduced by the act, were intended to be general; such as extending the remedy to executors, (*section 1*) transferring judgments to the county clerk's office, so as to become a lien on land. (*Sections 20, 21.*) So of sections 29, 41, 45, &c. The 10th, 11th, and 16th sections, expressly mention *city or town*. Section 27, in giving the precedent of a conviction, begins, "*City of New York,*" or, "*Westchester County.*" Sections 37 and 38 say, Courts of Common Pleas, or *Mayor's Courts*, and Clerk's office of *city or county*; and section 40 expressly authorizes the several Courts of Common Pleas and *Mayor's Courts* in this state, to make rules to regulate the practice on appeals. The 41st section speaks the same language.

The words, "*city and county of New-York,*" in the 1st section, apply to the jurisdiction of the magistrate only. The 106th section of the act to reduce the several laws relating particularly to the city of *New-York* into one statute, passed *April 9th, 1813, (2 R. L. 342)* gives jurisdiction of \$50 to the Justice's Court of that city; and it was not necessary to repeat it again in the act of 1824. The act of 1818, (*sess. 41, ch. 94, s. 5*) contains the same proviso as to costs on recoveries under \$50, as is contained in the 33d section of the act of 1824; but as the former is repealed by the latter, (*s. 43*) it can have no application to the present question.

Against the motion it was said, that the 85th section of the act to reduce the several laws relating particularly to the city of *New-York*, into one act, passed *April 9th, 1813, ex-*

establishes Assistant Justice's Courts in the several wards in the city of *New-York*, and gives them jurisdiction over certain actions, where the damages, or thing in demand, shall not exceed 25 dollars. The 105th and 106th sections establish the Justice's Court with jurisdiction to \$50. The jurisdiction of the Marine Court is extended to \$100 by the act of *April 15th*, 1817, (*sess.* 40, *ch.* 249, 4 *L. N. Y.* 288, *b.*) The Court of Assistant Justices is established in the several wards, excepting the 9th, with jurisdiction to \$50, by the act of *January 4th*, 1820, (*sess.* 43, *ch.* 1, 5 *L. N. Y.* 3 *b.*)

ALBANY.
October, 1824.

Van L  w
v.
King.

The general act to extend the jurisdiction of Justices, passed *April 10*, 1818, (4 *L. N. Y.* 79 *c.*) extends their jurisdiction to \$50; and provides (section 5,) that if, in any action brought in any court of record, the plaintiff shall fail to recover over \$50, he shall not recover any costs, if the suit might have been commenced before a *Justice by virtue of this act*. The act modifying this last mentioned act, passed *April 21*, 1818, (*sess.* 41, *ch.* 265, 4 *L. N. Y.* 287 *c.*) gives the Assistant Justices in the city of *New-York* the like jurisdiction and power as *Justices of the Peace* under the act of *April 10*, of the same year.

The act of 1824, for the better and more speedy recovery of debts, to the value of \$50, is intended to supersede all the other acts relating to the proceedings of Justices' Courts, excepting in the city of *New-York*, (*act of 1824, supra, 47th sess. L. N. Y.* 279.) The 43d section of this act, repeals the old Justices' act for the country, of 1813 (1 *R. L.* 387) and the act to extend the jurisdiction of Justices of the Peace (4 *L. N. Y.* 79 *c.*) which applied to the city of *New-York*. The 33d section of the act of 1824, provides, "that if the plaintiff, in any suit which may be brought in any court of record in this state, after the first day of *May* next, shall fail to recover a sum exceeding \$50, he shall not recover any costs of the defendant, provided the suit so brought might have been commenced before a *Justice of the Peace by virtue of this act*." The first section expressly *excepts the city and county of New-York*; for it specifies the particular actions which shall be cognizable before any *Justice of the Peace, with the exception of the city and county of New-*

ALBANY,
October, 1824.

Van Lew
v.
King.

York; so that the Justices' Courts of that city must depend for their jurisdiction upon the local acts provided for them; and in none of these local acts is there any provision that restrains a party from recovering costs, where he fails to recover a sum over \$50.

The only restriction is that of the 5th section of the act concerning costs (1 *R. L.* 344,) which provides, "that if any action, not concerning any freehold or title of land, nor for any assault, battery or imprisonment, nor slander, nor malicious prosecution, nor by or against executors or administrators, be brought in any Court of Common Pleas, and the plaintiff shall not recover over \$25, he shall not recover, but pay costs."

The reason why the act of 1824 mentions city or town, will be seen by looking at the 46th section, by which the provisions of that act are extended to all the cities in the state by name, except *New-York*.

The counsel for the plaintiff remarked, that his argument against the motion was little more than a copy of the opinion given by his honor *J. T. Irving*, the first Judge of *New-York*, who taxed the costs under review.

C. Graham, for the defendant.

R. I. Wells, contra.

This Court, adopted the reasoning of Judge *Irving* in the Court below; and gave their opinion that he was right in allowing the plaintiffs their costs; that as to all actions in which the plaintiff recovers upwards of 25 and less than \$50, though they be cognizable before a Justice, the Common Pleas of the city of *New-York* has concurrent jurisdiction, not only of the subject matter, but of the costs.

ALBANY,
October, 1824.Ex parte
Clarke.STONE *against* BURT.

ON error from the C. P. and judgment affirmed, double costs were taxed, without proof to the taxing officer that the plaintiff in error had delayed the execution below by putting in bail.

C. P. Kirkland, moved for a retaxation, on this ground, and cited 1 *R. L.* 346, s. 14. 2 *Sayer on Costs*, 200. *Peters & Gedney v. Henry*, 6 *John. Rep.* 278.

Curia. The statute cited gives double costs in those cases only where execution is *actually* delayed by the writ of error. Such delay should be proved to the officer before he is warranted in taxing double costs.

Motion granted.

Double costs are not allowed of course to the defendant in error on affirming the judgment; but it should be shewn that execution was actually delayed by the writ of error; and this should be proved to the taxing officer before he is warranted in doubling the costs, within the statute (1 *R. L.* 346, s. 14.)

Ex parte JOHN H. CLARKE.

ON an appeal from a Justice's Court to the *Onondaga* Common Pleas, between *Clarke*, appellant, and *Pratt*, appellee, the notice of appeal served on the Justice did not state, that *he appealed to the Court of Common Pleas of the county of Onondaga*. The appeal bond recited that the appeal was to that Court, and the Justice duly made and filed his return; but the Court, on motion, quashed it on the ground of the above defect in the notice.

V. Birdseye moved for a mandamus commanding the C. P. to proceed with the appeal.

Curia. The Common Pleas have nothing to do with the question whether the notice was good or bad. If it con-

The notice of appeal served on the Justice pursuant to the act, (sess. 47, ch. 238, s. 36) did not state that the party appealed to the court of common pleas of, &c. but the appeal bond recited that the appeal was to that court; and the justice made a return; held regular.

Semb. the party cannot object that the notice of appeal is defective, but this lies with the justice only. If he deems himself sufficiently informed, and return accordingly, it is enough.

ALBANY,
October, 1824.

Ex parte
Stone.

tained such information as satisfied the Justice, and instructed him as to the place of return, it does not lie with the party to object that it is defective. Here was nothing to mislead or injure him. The bond was in the proper form; and the intention of the appellant could not be mistaken.

Rule for an alternative mandamus.

CLARKE *against* RATHBUN:

Where a judgment is reversed on error to the C. P. upon a bill of exceptions taken there, costs should be taxed for the bill at the common pleas rate only.

ON error from the Court of Common Pleas upon a bill of exceptions, the judgment being reversed, the taxing officer allowed Supreme Court costs for drawing and copying the bill of exceptions. A motion was now made to retax the bill in this particular.

D. Tillinghast, for the motion.

C. E. Clarke, contra.

Curia. This is a service performed in the Court below; and the costs should be allowed at the Common Pleas rate only.

Motion granted.

Ex parte STONE.

Where a suit was bro't in the C. P. and removed by the defendant into the supreme court by *habeas corpus*, and the plaintiff neglected to follow the suit here; but brought another action for the same cause in the C. P.; held, that the court below might stay the proceedings of the plaintiff in the second suit, till the costs of the first were paid.

IN a cause in the Common Pleas of *Jefferson*, between *Stone*, plaintiff, and *Hooker*, defendant, the Court made a rule that all proceedings on the part of the plaintiff be stayed till the costs of a previous action for the same cause against the same defendant brought in the same Court, and removed, by the defendant, into this Court by *habeas corpus*, be first paid. The suit upon the *habeas corpus*, not

brought another action for the same cause in the C. P.; held, that the court below might stay the proceedings of the plaintiff in the second suit, till the costs of the first were paid.

being pursued by the plaintiff, was at an end. A motion was now made for a mandamus commanding the Court below to proceed to the trial of the cause, notwithstanding the rule.

ALBANY,
October, 1824.

Sanford
v.
Chase.

N. Rathbun, for the motion.

J. Butterfield, contra.

Curia. The power exercised by the Courts to stay proceedings, till the costs of a former suit for the same cause are paid, does not depend exclusively upon the question whether their collection can be enforced by execution. It is an equitable jurisdiction; and intended to prevent the vexatious multiplication of suits. (*Ginger v. Barnardiston*, 2 Bl. Rep. 904.) Here the plaintiff has voluntarily, and without shewing any excuse, forborne to pursue his action upon the *habeas corpus*. The Common Pleas were right in staying the proceedings. (*Perkins v. Hinman*, 19 John. 238. *Tidd*, 478. 1 Dunt. Pr. 337. 3 B. & P. 23, n.(a) 4 Mod. 379.) In *Lawrence v. Dickenson*, (1 Cowen's Rep. 580,) the plaintiff offered to proceed upon the *habeas corpus*; but the defendant refused to receive a declaration.

Motion denied.

SANFORD against CHASE.

THE defendant was arrested and holden to bail, while he was attending as a witness before arbitrators. The defendant then resided in the state of *Massachusetts*, but being in the county of *Columbia*, was subpoenaed to attend.

A motion was now made, that he be discharged from the arrest, and that the bail bond be delivered up to be cancelled.

U. Cole, for the motion.

One attending as a witness from a foreign state, before arbitrators, being arrested by virtue of a *capias ad respondendum*, was discharged absolutely, without being required to file common bail.

ALBANY,
October, 1824.

Tunnichliff
v.
Lawyer.

A. P. Holdridge, contra.

Curia. The only question is, whether the defendant is to be discharged on filing common bail, or absolutely, from the suit. In *Norris v. Beach*, (2 *John. Rep.* 294) this Court discharged the defendant from the arrest, entirely and absolutely. In a subsequent case, (*Bours v. Tuckerman*, 7 *John.* 538) he was discharged on filing common bail. We adopt the first case. The privilege of a witness should be absolute. An arrest should not be valid even for the purpose of giving jurisdiction to the Court out of which the process issues; more especially where the witness is attending from a foreign state.

Motion granted.

TUNNICLIFF *against* LAWYER.

Case, for obstructing a stream, and flowing the plaintiff's land. Plea, the general issue. The defendant, on the trial, gave evidence to shew that he, and those under whom he claimed, had so obstructed the stream for 20 years. Verdict for the plaintiff, \$90. Held, that he was entitled to supreme court costs, as the title to the freehold was drawn in question, within the statute, (1 *R. L.* 344, s. 4.)

CASE, for obstructing the waters in the outlet of a lake, by which the plaintiff's lands were flowed and injured, tried at the *Otsego* Circuit, and a verdict found for the plaintiff, of \$90. The plea was the general issue. On the trial, the defendant contended for a right to make the obstruction complained of, on the ground that he, and those under whom he claimed, had exercised this right for more than 20 years before the commencement of the suit; and this was the principal question, upon the trial, to which witnesses were examined. The plaintiff's costs being taxed as Supreme Court costs, a motion was now made to have them re-taxed as Common Pleas costs.

T. Lawyer, for the motion, cited 1 *B. & P.* 400; 2 *Saund. Rep.* 175 u. n. (2); 1 *R. L.* 344, s. 4; 2 *Dunl. Pr.* 714, and the authorities there cited.

I. Seelye, contra.

Curia. It is not stated with what view the evidence of 20 years' enjoyment of the right to obstruct was offered; but

we may fairly intend, from the papers submitted, that it was to establish a prescription. The evidence tended to this, though it came short of making it out. It is not necessary, to give the plaintiff costs, that the defendant should set up and attempt to establish a title by deed. An attempt to make out his right by adverse possession, or prescription to have an incorporeal right in the land of another, equally draws the title to freehold in question, and satisfies the words of the statute. It is enough that the defendant offers evidence pertinent to the question of title, which he has done in this instance. The principle of taxation was, therefore, right; but, as some of the items are exceptionable, let them be re-taxed, as Supreme Court costs, at the expense of the plaintiff.

ALBANY,
October, 1824.
Knickerbacker
v.
Shipherd.

Rule accordingly.

KNICKERBACKER *against* SHIPHERD.

A *fi. fa.* was issued, in this cause, to *John Doty, Esq.* late Sheriff of the county of *Washington*, about the 1st September, 1820, directing him to collect \$1273,64, with interest from 7th May, 1819. *Doty* then had in his hands several writs of *fi. fa.* against the defendant, in favour of different plaintiffs, which were arranged and paid; but the Sheriff claimed fees upon them to \$31,51. The defendant had personal property to the value of 2 or \$300, which was levied upon about the 1st of June, 1822, by virtue of several Justice's executions, and sold about the 27th July following. In August, 1821, preceding, and at two different times afterwards, before the 1st April, 1822, the plaintiff in this cause directed the Sheriff to stay proceedings on the *fi. fa.* on condition that the defendant paid the interest, which, however, was not done; but the Sheriff contended that the plaintiff had lost his lien by these several delays. In 1822, the plaintiff directed the defendant's property to be advertised and sold on his execution, in consequence of which the Sheriff

The sheriff sells lands on execution in favour of *K.* against *S.* having, at the same time, some executions on older, and some on younger judgments, against the same defendant, which are paid, excepting the fees. He may retain his fees upon those executions which are on judgments older than *K.*'s, but not so as to those which are younger.

ALBANY,
October, 1824.

Knickerbacker
v.
Shipherd.

advertised the real estate of the defendant for sale, on several executions, being the plaintiff's and the several executions first above referred to. The real estate was sold about the 15th September, 1822, and purchased by the plaintiff, for less than the amount due on his *fi. fa.* from which the Sheriff claimed to deduct \$22, for fees on this, and \$31,51, for fees on the other executions, which were satisfied when this was delivered. \$7,24 of the \$31,51, were thus claimed on two judgments docketed subsequent to this, as the parties supposed, though it was agreed that this might be corrected by the docket.

J. Bloore, for the plaintiff.

J. Billings & J. Willard, for the Sheriff, cited *Hildreth v. Ellice*, (1 *Caines' Rep.* 192.)

Curia. The Sheriff may retain on the elder judgments, but not on those which are younger than the plaintiffs. Payment of the debts did not pay the fees; and unless the Sheriff is allowed to retain upon the elder, the consequence would be that the plaintiffs in those executions must pay the fees out of their own pockets; while sufficient property remains for that purpose.

The Sheriff is liable to refund \$7,24, unless the two judgments supposed to be docketed subsequent to *Knickerbacker's*, shall appear, by the docket, to be earlier.

Rule accordingly.

ALBANY,
October, 1824.Jackson
v.
Garnsey.JACKSON, *ex dem.* PIONEER and others, against GARNSEY.*Eight other several causes, on the same demise, against different defendants.*

At the last *August* term, application was made, in these causes, for judgment as in case of nonsuit, which was founded on one notice and affidavit, embracing all the causes; and but one motion was made for the whole. This motion was resisted by one set of affidavits, embracing all the causes, and containing the same facts as to all. The motion was denied, with costs, and only one rule entered. These costs were taxed at \$14,18 in the first, and \$8,43 in each of the other causes.

A. Van Vechten, for the defendants, moved an appeal from this taxation, on the authority of *Jackson v. Keller*, (18 *John*. 310.)

L. H. Palmer, contra, cited *Boyce v. Thompson*, (20 *John*. 274.) He said *Jackson v. Keller* was the case of a motion granted. Here it was denied, with costs; and the grounds of opposition might be different in each cause.

Curia. Let the costs be re-taxed; the whole to be included in one bill, and but one taxation to be charged; the Clerk's fees to be allowed and included in the bill, according to the rule in *Boyce v. Thompson*, (20 *John*. 274.) We allow but one fee to the attorney, one fee to counsel, and one brief, one copy of costs, one notice of taxation, and one attendance, one service of rule, and one power to demand costs. It is true, that *Jackson v. Keller* was the case of a motion granted; but the principle is the same, whether the costs be on granting or denying the motion. If it be plain, in either case, that one set of affidavits is sufficient, no more should be allowed.

Motion, by several different defendants, on one set of affidavits, in divers causes, at the suit of the same lessors of the plaintiff; opposed on one set of affidavits entitled in all the causes, and the motions denied with costs.

Held, that there should be only one taxation in all; the services of the attorney and counsel for the plaintiff to be taxed as if there were only one cause, but clerk's fees to be allowed in the several causes, according to *Boyce v. Thompson*, (20 *John*. 274.)

Rule accordingly.

ALBANY,
October, 1824.

Warner

v.

Tooker.

WARNER, *q. l.* THE PEOPLE, against TOOKER.

In debt upon the 4th section of the act for the prevention of frauds (1 R. L. 76,) whether the jury should find the value of the goods? *Quæra.*

If they omit this, and find for the plaintiff generally, the verdict is not void; and a judgment thereon will not be set aside for irregularity.

If the defendant have any remedy, it is by writ of error.

If a verdict be irregular, the party should move to set it aside the next term after it is rendered.

DEBT upon the 4th section of the act for the prevention of frauds, (1 R. L. 76.) The declaration commenced by demanding \$1000 of debt; and the 1st and 2d counts, respectively, stated the value of the goods at \$325, and demanded that sum. The 3d count stated the value of the goods at \$350, and demanded that sum; the sums in the three counts making \$1000. Plea the general issue. Verdict for the plaintiff at the *Oneida Circuit, December 26th, 1823.* The verdict was sealed, and in these words: "In the above cause we find for the plaintiff." The Circuit Judge certified that the amount to be recovered was not contested on the trial; but the amount claimed by the plaintiff's counsel was \$391,23, being the amount which the defendant confessed he gave for the property in question. Upon this verdict a judgment was perfected in *March, 1824,* for \$391,23, with a *remittitur* of \$608,77, of which the defendant's attorney was not informed till after last *May term.*

At the last *August term,* a motion was made to set aside the verdict for irregularity, because all the jury were not present when the verdict was delivered; but the Court were of opinion, that, admitting the verdict to be irregular for that reason, the motion came too late. The party should have moved at the next term after the verdict.

A motion was also made at the last *August term* to set aside the judgment, on the ground that it was entered upon a verdict void on its face.

G. C. Bronson, for the defendant, adverted to the statute (1 R. L. 76.) and insisted that one material part of the issue was upon the value of the goods; and the jury omitting to pass upon this, the verdict was a mere nullity; and the judgment, therefore, irregular. He cited to this point, *Bac. Ab. verdict, (M) pl. 1. (Q) pl. 1. (Z) pl. 3. 3 Salk. 372, 374. Brockway v. Kinney, 2 John. Rep. 210. Brown v. Smith, 3*

Cases' Rep. 81. *Bac. Abr. action qui tam (B).* 2 *Hawk. P. C.* 380, *Dub. ed.* 1 *id.* 480, s. 6. 484, s. 21. *Com. Dig. Pleader,* (S. 19, 20, 21.)

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

The jury do not pronounce upon which count they give their verdict.

S. Beardsley, contra. The verdict was not void. It was in the usual form, and would, in strictness, perhaps, have warranted an entry upon the *postea* of a finding for the whole sum claimed of \$1000; but as it was doubtless the intention of the jury to find the amount proved, we have remitted all except this. The verdict may be thus amended either by the Judge's minutes, or by a *remittitur*, as was done here. (2 *Archb. Pr.* 241, 242. 1 *Wils.* 33.) Verdicts should be construed favorably, (*Burr.* 699, 700. 2 *Salk.* 664,) and, it appearing that no injustice has been done, is a reason against setting a verdict aside. (*Burr.* 1255-6. *Dinl. Pr.* 679, and *cases there cited.*)

Curia. It is an answer to this application, that the verdict is not void, so as to make the judgment irregular. Without saying whether the verdict be voidable or not, we are clear that the defendant cannot try that question in this form. The verdict appears upon the record, and the party must be put to his writ of error.

Motion denied.

REID, admx. of REID,
against

THE PRESIDENT, &C. OF THE RENSSELAER GLASS FACTORY.

THIS cause having been referred pursuant to the statute (1 *R. L.* 516, s. 2,) the referees had reported generally for the plaintiff, upon which the attorneys for the respective parties agreed upon a case containing the facts as they appeared in evidence before the referees, and thereupon submitted a question of law to this Court, in the form of a motion to set aside the report. This Court having decided the question and given judgment, the defendant's attorney, being desirous to have the same question considered by the Court of Error,

The facts which appeared before referees appointed pursuant to the statute (1 *R. L.* 516, s. 2) ordered to be entered upon the judgment record, so that the party might review the case on error.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

B. F. Butler moved for a rule, requiring the plaintiff to incorporate the facts contained in the case in the record of judgment.

S. A. Foot, contra, could hardly suppose the motion to be urged seriously. It is unprecedented; and the record sought for would differ from any which had ever before been made. There are but three ways of getting the facts upon record. These are by demurrer to evidence, bill of exceptions, or special verdict. He supposed some authority would be shewn for the anomaly now sought to be introduced into our forms. As well, and indeed better, might a case be turned into a special verdict or bill of exceptions, without any stipulation for the purpose. Yet this was never allowed, and has been repeatedly denied. It may be said, that if this motion be denied, we never can go from a reference into a Court of Error upon the facts appearing before the referees. That is true. If there be a question of law in the cause, the course is for the party against whom the application is made, to shew this in answer to the application for a reference; and thus drive the party moving to a jury, where he can take a bill of exceptions. By not doing this, he waives his right to bring error, as fully as if he suffers a trial to pass without demurring to the evidence, or taking a bill of exceptions, or asking for a special verdict. He cited *Tidd*, 788; and said that *Sikes v. Ransom*, (6 John. 279,) *Medberry v. Collins*, (9 id. 345,) and *Lanuse v. Barker*, (10 id. 312) all go upon this ground; and depend on a familiar principle in the English practice.

Butler, in reply, said the analogy to a trial and omission to demur, &c. which was insisted upon, did not hold. In that case, the party has power to demur or except; but it is not pretended that any such form could be resorted to before referees. This motion rests upon the principle of *Shotwell's case*, (10 John. 304. 12 id. 31.) There being no other mode to get before a Court of Error than that of bringing up the facts by affidavit or case agreed upon, necessity dictates the course to be taken. The motion rests on the same ground as if the cause had been brought before the Court in the usual way by affidavit and counter affidavit.

ALBANY,
October, 1824.Jackson
v.
Chapman.

A writ of error cannot be denied to the parties. It is a writ of right. The referees are made judges by act of law, which will give the remedy. A case in point from *England* is not to be expected. They have no such form of proceeding. References there are at common law, by the act of the Court, being a mere matter of discretion. Our statute is imperative. A question of law may or may not arise before the referees. The party is not put to determine at his peril, what no human being can do, whether a question of law is to arise before them or not. The most important question may come up there, without either party being able to anticipate it. The whole cause may turn upon the improper rejection or admission of testimony; and, indeed, it is not always an objection to a reference, that questions of law will arise, where it appears that they are mixed up with accounts.

The judgment is always entered as upon the report. Granting this motion is only changing a general into a special report. It is introducing nothing new on the record, but merely changing the form of that which is uniformly entered there, and in the same place, with a view to further the right of the case.

The Court (after having the cause several days under advisement,) directed the following

RULE : "That a statement of the facts in this cause be drawn up under the direction of the Chief Justice, to be incorporated in the record, in this cause, in order that the defendants may be enabled to prosecute their writ of error, if they shall be advised so to do."

WOODWORTH, J. being interested in the cause, gave no opinion.

ALBANY,
October, 1824.

Jackson
v.
Chapman.

JACKSON, *ex dem.* HADLEY & OTHERS, *against* CHAPMAN &
OTHERS.

A defendant in ejectment, tho' he settled under color of a *bona fide* purchase on a military lot, may be turned out of possession, without pay for his improvements, within the statute, (1 R. L. 303, s. 2, 4; 3 W. & S. 399; sess. 26, ch. 78, s. 2) unless he shew that he settled there before the 8th day of April, 1813, when the last act concerning lands in the military tract passed.

EJECTMENT for lot No. 90, in *Hector*, in the county of *Tompkins*. Verdict for the plaintiff, at a Circuit in *Tompkins*, in 1823, before NELSON, C. Judge, who certified that it appeared, at the trial, that this lot had been patented to *Bishop Hadley*, a soldier of the revolutionary war, in the line of the state of *New-York*, in the army of the *United States*, who died before the 27th March, 1783; and that the lessors of the plaintiff were his heirs at law, upon which title the plaintiff recovered; that it farther appeared, on the trial, that the defendants respectively were actual settlers on this lot, and had entered and settled on the same under color of a *bona fide* purchase, about the year 1818, and before the commencement of the suit; and had made improvements on the several parts of the lot occupied by them respectively; and that the lessors of the plaintiff, before the commencement of the suit, offered to have these improvements appraised, and to pay for them, which the tenants refused.

Two other causes were similarly situated. Upon these facts,

J. A. Collier, moved for rules staying all proceedings on the part of the plaintiffs respectively, till their lessors should pay to the several defendants, the value of their respective improvements, which they had made at the time the suits were brought, according to the statutes of 1803 and 1813, (1 R. L. 303, s. 2, 4; 3 W. & S. 399, sess. 26, ch. 78, s. 2,) which provide, that where "any person or persons, shall have" actually settled on any of these military lands, under color of a *bona fide* purchase, and, in any action to be instituted for the recovery of the lands, a judgment or decree shall pass for the plaintiff against the tenant, the former shall not be permitted to take possession, till he shall have paid the tenant the value of the improvements made by him, or those under whom he claims, &c.

ALBANY,
October, 1824.Jackson
v.
Chapman.

He was aware that the motion would be opposed, on the ground that the words of the statute, "where any person or persons *shall have settled*," &c. are retrospective, and relate merely to such defendants as settled on these lands previous to the passage of the act; but there are several statutes couched in similar language, which are daily construed to operate prospectively, and under which important rights have arisen. Thus, the statute relative to the Court of Probates and Surrogates, (1 R. L. 450. s. 23) provides, that when any executor or administrator, whose testator or intestate *shall have died seised*, &c. shall discover that the personal estate is insufficient to pay debts, it shall be lawful for him to sell the real estate, &c. So the statute authorizing the general issue, and double costs, in certain cases, to be awarded to defendants, (1 R. L. 155, s. 1) gives the double costs which they *shall have sustained* by reason of the suit. So, by the statute, (1 R. L. 468, s. 19) as to distributing the moneys of insolvent debtors, the assignees are to distribute the moneys which *shall have come* to their hands. So, in the poor act, (1 R. L. 278) every person who *shall have come to inhabit*, &c. shall be deemed settled, &c. So, in the act for the relief of cities and towns against the maintenance of bastard children, (1 R. L. 309, s. 6) the putative father is to be discharged, unless an order of filiation shall be made in 8 weeks after the mother *shall have been delivered*. Similar words are found in other statutes, which are constantly construed to have a prospective effect.

The words in question are, *shall have settled*. The legislature never meant to confine this to a period between 1783 and 1813. If so, the words would have been, "shall have heretofore settled," &c.

S. Stevens, contra. The acts referred to by the counsel for the defendants, to illustrate the propriety of his construction, were all passed for the purpose of providing a remedy in cases *thereafter* arising. They were prospective, from the nature of the subject matter. The act in question relates to *past* tenants—to facts which already existed at the time when it passed. The words are not, "persons who

CASES IN THE SUPREME COURT

ALBANY,
October, 1824.

Jackson
v.
Chapman,

may hereafter settle." The case of *Jackson v. Bush*, (3 *John. Rep.* 512) virtually disposes of this question. It was there taken for granted, that, in order to constitute a right to improvements, the defendant must shew that he entered before the 5th April, 1803; and the Court treat the finding of this fact as very material.

D. Cady, (ut *amicus Curia*) referred to a MS. case, *Jackson, ex dem. Jenkins et ux. v. Williams*, lately decided by this Court, in which they recognized the construction contended for by Mr. Stevens.

Cur. adv. vult.

At another day,

SAVAGE, Ch. J. said, that taking up this question as undecided, the Court had differed in the construction to be given to the act, and they had accordingly availed themselves of the case to which they had been referred by Mr. Cady. That case not being distinctly within the recollection of either of the present members of the bench, it struck the Court, at first, that it might have turned on some point different from that supposed by Mr. Cady. He (the Ch. J.) had, therefore, inquired of the late Ch. J. *Spencer*, who was on the bench when the question arose, and took part in the decision; and he agrees, in his recollection, with Mr. Cady. The Court deem it their duty to yield to the authority of this case, and are unanimous that the act must be deemed retrospective in its operation; and, consequently, that the defendants can take nothing by their motion.

Motion denied.

REID, administratrix of REID,

against

THE PRESIDENT & DIRECTORS OF THE RENSSELAER GLASS
FACTORY.*ALBANY,
October, 1824.Reid
v.
Rensselaer
Glass Factory,

ASSUMPSIT to recover the balance of an unsettled account. On the 1st of May, 1812, the president, &c. of the *The Rensselaer Glass Factory*, a company engaged extensively in the manufacture of glass, entered into co-partnership for a year with *R. & A.* two stockholders, in conducting the concern, *R. & A.* to make the necessary advances in money, and receive interest. On the 1st of May, 1813, the company appointed *R.* their general agent, large advances being necessary to carry on their business. No salary was agreed on; but a previous agent had received a salary of \$1250 per annum, and this was no more than a reasonable compensation for *R.*'s services while agent, until the factory was destroyed by fire on the 31 May, 1815. *R.* continued agent from the 1st May, 1813, till his death, in August, 1821; residing in the vicinity of his principals, who occasionally met at his house. During the period of his agency, he made necessary cash advances in and about carrying on the concerns of the company to more than \$100,000, which he had charged in an account of more than 500 items; and had received in cash nearly the same amount, which he credited in the same book in upwards of 700 items. He never rendered any account to the company; nor did he apprise them that they were in arrear until the 2d January, 1819, when he was requested by one or more of the directors to present his account: which request was afterwards repeated by one or more of the directors, but never complied with. On his death, his personal representative claimed interest on the advances, as well as on the salary or compensation for his services; *held*, that she should recover interest upon the advances to the 2d January, 1819, when he was requested to make out his account; but not after; *held*, also, that she should not recover interest on the salary.

As a general rule, interest is allowable on cash advances, though they rest in the form of a mutual, current, unliquidated account. Whether such charges come strictly within the definition of an account? *Quere.* Interest is not allowable on an unliquidated account for work and labor. The English and American cases examined at large by the court and counsel in reference to the following heads:

1. Interest on money lent;
2. On money paid, &c. or advanced;
3. On money had and received;
4. On money due for work, labor and services;
5. For goods, &c. sold and delivered;
6. On open, current, unliquidated accounts;
7. On an account stated, or balance struck;
8. The general principles upon which interest is chargeable.

* This cause was decided at August term, 1824. Vid ante, 387, S. C.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

The cause requiring the examination of long accounts, it was referred at *January* term, 1822, heard by the referees on the 18th *February*, of the same year, and at various subsequent days, and submitted to them on the 21st *March*, 1822; two of whom reported for the plaintiff \$14,913.40, after deducting \$2317.53, being the amount agreed between the parties to be due from *John Reid*, the intestate, to the defendants, on an account current between him and a joint concern, in which the defendants and *John Reid* and *Robert Alsop* were interested.

It appeared in evidence before the referees, that the defendants' factory was situated in the town of *Sandlake*, in the county of *Rensselaer*, about ten miles from the city of *Albany*. *John Reid*, the intestate, was agent for the defendants from the 2d *June*, 1812, to the time of his death in *August*, 1821, and, during the time of his agency, resided in the city of *Albany*. The factory of the defendants was in actual operation from the 1st *May*, 1813, to the 3d *May*, 1815, when it was destroyed by fire, and after this, no glass was manufactured by the defendants. The plaintiff produced an account current, showing a large balance due to her for principal and interest. The debit side of the account contained 327 items, each of which was for cash advanced, or paid out by the intestate, for the purpose of keeping the factory of the defendants in operation. The credit side of the account contained 787 items, each of which was for cash received by the intestate, for glass made at the factory, and for other property of the defendants, sold by the intestate on their account. The whole amount of cash advanced and paid by the intestate, for the defendants, between the 1st *May*, 1813, and the time of his death, and charged to them, was \$107,579.74. The amount received by him during the same time, and credited to the defendants, was \$100,099.88.

The plaintiff proved an actual advance, or payment of cash, in every instance, as charged in the debit side of her account, with the exception of four items, amounting in the whole, without interest, to \$288.99.

The referees charged the plaintiff, in making up their report, with \$105,11, being the amount, exclusive of interest, of two debts due the defendants; on the ground that she had not shown that the intestate used due diligence in collecting them.

The defendants were charged with the sum of \$3125, for the intestate's salary as agent, from the 1st May, 1813, to the 1st November, 1815, at the rate of \$1250.

They were also charged with the necessary disbursements of the intestate in and about the business. An interest account was also stated, in a general account current, in which the defendants were charged with interest from the time of the advance, or payment of each sum of money, to the 4th day of May term, 1822, and credited with interest on each sum of money received, from the time of its receipt till the same 4th day of May term. Interest was also calculated on the items of salary, from the end of the year when the salary became due, to the same time. The balance of interest thus found on all the debits proved and receipts admitted before the referees was \$10,348,08.

The balance of principal which the referees found due at the date of their report was \$6882,91.

In March, 1806, the factory of the defendants went into operation. In that month, the defendants appointed *James Kane*, of the city of *Albany*, their agent, by a resolution in the following words: "*Resolved*, that *James Kane* be, and he is hereby appointed agent." *Kane* continued to be the agent of the defendants from the time of his appointment till the intestate's appointment. In the month of *April*, 1809, the defendants leased their factory, together with all things in, and attached to it, for 3 years, from the 1st May, 1809, to five stockholders. *Kane*, one of the lessees, was their agent, and resided the city of *Albany*, during the time of his agency. At the expiration of this lease, namely, on the 1st May, 1812, the intestate, *Robert Alsop*, and the defendants entered into a co-partnership under the name of *John Reid & Co.* for the purpose of manufacturing glass at the defendants' factory, which was to continue for one year. *Robert Alsop* superintended the business at the factory, and

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

resided there. The intestate resided in the city of *Albany*, and made the necessary advances of money for the concern, and received the proceeds of the sales of glass, and other property, in the same way as he advanced and received money while agent of the defendants. By the articles of this co-partnership, the stock and materials of the defendants on hand on the 1st *May*, 1812, and which amounted as per inventory then made, to \$13,997,87, was deemed, by the parties, an advance to the partnership fund, and an equal quantity of materials was to be returned to the defendants on the 1st *May*, 1813; or the deficiency charged to the intestate and *Alsop*. When this co-partnership ended, viz. on the 1st *May*, 1813, an inventory was taken of all the materials and stock then owned by the defendants. They were found to amount to \$13,186,58. The accounts of the business of this co-partnership were rendered by the plaintiff to the defendants and *Alsop*, during the reference, and adjusted by mutual consent, and the balance sheet produced on the bearing. A balance of this concern was struck as of the 1st *January*, 1815. In the liquidation of the account of this concern with the intestate, interest was debited and credited, and allowed by the defendants in the same manner as it was debited and credited in the general account current of the plaintiff before mentioned, and there was a balance of interest thus allowed to the intestate of \$1393,10. By the articles of co-partnership, it was agreed that interest should be allowed on the amount of the inventory, and on all monies advanced by *Reid & Alsop*, who, by the articles of co-partnership, were to make all necessary advances of cash to carry on the business; and it was also expressly reserved by the defendants, at the time of the adjustment of the partnership concern, that the question of interest in this cause should not be affected by that adjustment, any further than the articles of co-partnership and the account made in pursuance of them affect that question. A balance of principal and interest was found due to the defendants from the intestate on the 1st *January*, 1815, of \$1531,38, and, by agreement of the parties, this sum, together with the interest to the 4th day of *May* term, 1822, being \$786,15, was to be deducted

from the amount found due from the defendants to the plaintiff; but the interest on that balance, from the 1st *January*, 1815, was not to be deducted, unless interest was allowed on the accounts between the parties in this suit.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

When the intestate was first appointed agent, it was by a resolution in the following words: "Resolved, That *John Reid* be, and he is hereby appointed agent for this corporation"—and every subsequent appointment was in the same words, or words of like import. When the intestate took the active agency of the factory, in *May*, 1813, the stock, materials and funds of the defendants were insufficient to keep the factory in operation, and large advances were required for that purpose.

No specifick agreement, between the intestate and the defendants, relative to his salary, was proved. It was, however, fully proved, that \$1250 per year, exclusive of disbursements, was a reasonable compensation for his services as agent; that *Kane*, who preceded him as agent for the defendants, was allowed by them, on the settlement of his accounts, the same sum per year, for salary, besides expenses, although there had been no agreement between him and the defendants on the subject; and that *Kane* had been allowed the same compensation by the lessees, some of whom were directors of the company when the intestate was appointed their agent, and while he continued to be so. The proceeds of all glass manufactured by the defendants, after the 1st *May*, 1813, were received exclusively by the intestate. All the accounts of the corporation, and book of minutes, were kept by the intestate. The general account current produced by the plaintiff, was rendered to the defendants on the 12th day of *October*, 1821. An account of the sales of glass received and sold by the intestate, on account of the defendants, was rendered to them at the same time, and no account current, or account of sales, was ever before rendered to them.

The whole of the accounts were not made out until after the death of the intestate, owing to his habits, though several attempts were made to complete them.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

It was admitted, that on the 2d day of *January*, 1819, when there was a meeting of the directors at his house, the intestate stated to the directors that there was a balance due to him from the defendants. Then one or more of the directors asked him to make out his account, and present it to the directors; and since that time he has been asked for the account by one or more of the directors. These requests were made by the directors, individually, but no resolution or entry was made, concerning the intestate's accounts, on the minutes. At a meeting of the directors, on the 27th day of *December*, 1817, the subject of the accounts of *James Kane* was agitated before the board, and the following entry was made in the book of minutes: "*John Reid* brought the subject of *James Kane's* demand against the company before the directors, and, after various views of the same, it was agreed, that *Mr. James* and *John Reid* be appointed a committee to liquidate and adjust the same." On the 27th *November*, 1806, a resolution was passed, appointing a committee to audit the accounts of *Kane*; also, on the 14th *April*, 1807; also, on the 23d day of *September*, 1807; and, also, on the 23d *February*, 1809.

The referees were unanimous in opinion, that there was due the plaintiff, at the date of their report, for principal, the sum of \$6882,91; but they differed in their opinion on the subject of interest, the referee dissenting from the report, being of opinion that interest ought to be calculated only to the 1st day of *January*, 1816, and the two referees making the report being of opinion that it should be calculated to the 4th of *May* term, 1822.

The question of interest was the only one raised upon the case; and it was agreed, by the parties, that this Court should settle the principles on which it should be calculated, and to what time, and refer it again to the referees, to report the amount in addition to the principal due; that their reports be deemed as one, and considered as made of *May* term, 1822; but no judgment to be entered, until 4 days in term shall have elapsed, after the making of such additional report.

B. F. Butler, for the defendants. 1. Whatever may be the plaintiff's rights as to interest, upon other parts of this account, it is impossible that she should be entitled to it on the charges for the salary of the intestate. The general rule is, that interest is not recoverable on uncertain demands, where damages are recoverable, and where the amount is unliquidated ; and if there is any case in which the rule should be applied, it is in an action for work and labour where the amount is unliquidated, especially when that amount is to be settled on a *quantum meruit*, in the same action where the interest is sought to be recovered. Here the amount due to the intestate, for his services, was wholly undetermined by the parties. There was no agreement between them on the subject. The referees heard the evidence, and fixed the amount of compensation.

Reid never demanded payment for his services ; and not doing this, the defendants had a right to infer that he had paid himself out of the moneys which he had received. At most, therefore, interest should be allowed only from the commencement of the suit.

That the referees erred, in allowing interest on the salary, he cited *Sweatland v. Squire*, (2 *Salk.* 623) *Trelawney v. Thomas*, (1 *H. Bl.* 303) *Walker v. Bayley*, (2 *B. & P.* 219) *Skirving v. Stobo*, (2 *Bay's Rep.* 233) *Gammell v. Skinner*, (2 *Gall. Rep.* 45) *Chit. on Bills*, 538, *Phil. ed.* In *Gammell v. Skinner*, which was a libel for mariner's wages, on the instance side of the *Admiralty*, Judge *Story* says, "There is no difference, in this respect, between the practice of our Courts of common law and that of the *Admiralty*. In the latter, interest is generally allowed from the time of a demand made for the wages ; and if no special demand is proved, from the time of the commencement of the suit."

2. The referees erred in allowing interest on the general account. This was wholly unliquidated. On the 1st *May*, 1813, *Reid* took charge of the factory, as agent, and from that time to *May*, 1815, when the factory was destroyed, made advances of money, carried on the establishment, and received all the avails of glass manufactured. There is no evidence of any agreement, between the parties, as to the

ALBANY,
October, 1824.

Reid
v
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid

v.
Rensselaer
Glass Factory.

allowance of interest, nor any circumstances from which such an agreement can be inferred. *Reid* advanced to the amount of \$104,000. He received about 100,000; and the balance due him on advances was short of \$4,000; which, with \$3125, for salary, made the sum of \$6882, the balance of principal found by the referees. The whole balance found by them is \$17,230, viz. \$6882 for principal—\$10,348 for interest; the interest on the salary being \$1600, and on the cash account \$10,300. The balance of interest due on the cash account is more than twice the amount of the principal. This account was not stated, nor the balance demanded, till the 12th October, 1821; and until that demand, at any rate, the plaintiff was not entitled to interest on this part of the account.

A recovery of interest must, to be sure, depend very much on the circumstances of the case; but the general rule is, that it is not allowable on a running, unliquidated, open and mutual account, until such account is stated by the parties, or, at least, rendered by one party to the other, which is considered a liquidation if assented to, or if not objected to within a reasonable time. The only exceptions are, 1. Where an express agreement to pay interest has been made and proved: 2. Where an intent to pay interest can be inferred, from the course of dealing between the parties, or the particular custom of the trade or place: or, 3. Where there has been fraudulent conduct, or a vexatious detention of the debt. (*Borret v. Goodere*, 1 *Dick.* 428. *Liotard v. Graves*, 3 *Caines' Rep.* 226. *Anonymous*, 1 *John. Rep.* 315. *Newell v. Griswold*, 6 *John. Rep.* 45. *Holliday v. Marshall*, 7 *id.* 211. *Kanes v. Smith*, 12 *id.* 156. *Walden v. Sherburne*, 15 *id.* 409. *Consequa v. Fanning*, 3 *John. Ch. Rep.* 601. *Selleck v. French*, 1 *Con. Rep. N. S.* 32. *Williams v. Craig*, 1 *Dall. Rep.* 313. *M'Connico v. Curzen*, 1 *Call's Rep.* 358, with the cases already cited to the first point.)

The principle of the rule, that where no agreement to allow interest has been made, nor can be inferred, the parties are not to be charged with it, applies with peculiar force here. Interest is in the nature of damages, for not paying the balance due; and is it fair that the party should be called

ALBANY,
October, 1824.Reid
v.
Rensselaer
Glass Factory.

on for such damages, when it is seen that he was ignorant of the amount of the balance; or, indeed, that any balance whatever was due? It was impossible for the defendants to know, until the settlement, whether *Reid* had advanced his own money or theirs. He had the custody of the books, could alone state them, and it was impossible for the defendants to know the situation of the accounts until *Reid* presented them. If the rule is right between merchants, *a fortiori*, it is so here. Among merchants, each party keeps the accounts, and each may know their state with reasonable accuracy.

But it was insisted, before the referees, and will, doubtless, be contended here, that the rule denying interest on unliquidated accounts is confined to those for *goods sold*, and other mercantile dealings between merchants and their customers; and that interest should be allowed here, on the ground that the debits were made up of moneys advanced for the use of the defendants. In support of this, *Liotard v. Graves*, (3 *Caines' Rep.* 226) was cited. In that case, the Supreme Court departed from the rule previously established by adjudged cases in *England*; for, though there was a loose *dictum* in *Bunbury*, and one or two adjudged cases in other books, in which it was said that interest was allowable on money lent or advanced, without any agreement, express or implied, yet the general current of the authorities was otherwise; and when *Liotard v. Graves* was decided, (*August*, 1805) the law was settled, in *England*, against the allowance, as was afterwards declared in *Calton v. Bragg*, (15 *East*, 223) where all the authorities are cited. The Court there held that interest is not allowable on money lent or advanced, even where the whole advance is of one sum, unless there is a contract for its allowance expressed, or to be inferred from the circumstances. The propriety of allowing interest in *Liotard v. Graves*, under the circumstances of that case, is not disputed. Its application to the present case is, however, denied. The Court did not decide, nor did they mean to decide, that, in all cases of money advanced, interest should be allowed. They only meant to say, that where a person requests another to lend him money, or advance it for his use, having no funds in his hands, it is so

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

much out of the ordinary course of mercantile business, that an agreement to pay interest is to be presumed. They did not intend to lay down a rule of universal application, without regard to circumstances. Accordingly, in *Pease v. Barber*, (3 Caines' Rep. 266) afterwards determined, Chief Justice Kent admitted, that allowing interest must depend much upon particular circumstances, even in that case, which was an action for money had and received. The advances in *Liotard v. Graves* were specifick, when the defendant had no funds in the plaintiff's hands. They were for prosecuting an appeal, and out of the ordinary course of business between the parties—not like this, which is the case of an agent making advances at his own discretion, on the strength of receipts either actual or expected, under his general authority, and without specifick request. No settlement was necessary, to enable *Graves* to ascertain whether he was indebted for those advances. Being specifick, and for a special purpose, they stood precisely on the same ground, so far as the question of interest was concerned, as if there had been no other dealings between the parties. Besides, *Livingston*, J. mentions, that there had been previous accounts rendered, on which interest had been charged and allowed by mutual consent. In this case, beside the distinguishing circumstances already noticed, there are a series of advances on one side, and receipts on the other, the whole account, consisting of moneys debited and credited, constituting a running cash account, at the same time that it was utterly impossible for either party, and particularly for the defendants, to ascertain how the balance stood, until the account was stated.

This Court has itself departed from the broad rule in *Liotard v. Graves*. It did so in *Kanes v. Smith*, (12 John. 158) which cannot be distinguished from this case. The *Kanes*, at *New-York*, were to advance monies in purchasing cargoes; while the *Smiths*, at *Madeira*, were to send wines to the *East Indies*, to be sold there, the *Kanes* to receive the monies, and reimburse themselves. They advanced more than they received, and claimed interest. The monied transactions between the parties were precisely like those in this case. But interest on the advances was denied.

This was followed by other decisions of this Court and the Court of Chancery, to the same effect. (*Walden v. Sherburne*, 15 *John. Rep.* 409. *Consequa v. Fanning*, 3 *John. Ch. Rep.* 601. *Campbell v. Mesier*, 6 *John. Ch. Rep.* 21.)

So, too, in the other states, although I admit there has been a general inclination to depart from the English rules, so far as to allow interest on money lent, or money had and received; still the Courts, which have gone farthest on the subject, have always confined the allowance to cases where the amount was certain, and to the peculiar equity of the particular case. They have never given interest on an unliquidated cash account, where the defendant's conduct was fair. The Supreme Court of *Massachusetts* allowed interest in *Fowler v. Shearer*, (7 *Mass. Rep.* 24;) *Wood v. Robbins*, (11 *id.* 504;) *Weeks v. Hasty*, (13 *id.* 218;) but refused it in *Porter v. Bussey*, (1 *id.* 438;) and *Storer v. Storer*, (9 *id.* 37.) In *Winthrop v. Carleton*, (12 *id.* 4,) it was allowed only from the commencement of the suit; and in *Wyman v. Hubbard*, (13 *id.* 232,) it was denied altogether. These are cases of money paid or money had and received; and it will be seen by an examination of them, that if the present case was to be determined in *Massachusetts*, there could be no question that interest would be denied.

The Superior Court of *Connecticut* allowed interest in *Selleck v. French*, (1 *Con. Rep. N. S.* 32;) but *Swift*, Ch. J. limits the rule in that very case, so as to exclude this; and in *Thompson v. Stewart*, (3 *id.* 171,) the Court denied interest on principles which apply here.

Pennsylvania has gone farther than any other state in allowing interest for monies. (*Rapelie v. Emory*, 1 *Dall.* 349, and note to that case. *Lessee of Dilworth v. Sinderling*, 1 *Bin.* 494. *Commonwealth v. Crevor*, 3 *id.* 121.) But the Supreme Court of that state denied interest in *Jacobs v. Adams*, (1 *Dall.* 52;) and limited its allowance in *Brown v. Campbell*, (1 *Serg. & Rawle*, 179) on the very principles we contend for here.

In *South Carolina*, the Judges find fault with the English rule, and allowed interest in *Goddard ads. Bulow*, (1 *Nott & McCord*, 45;) and *Thompson v. Stevens*, (2 *id.* 493;) but in

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

deciding the last case, the Court lay down the rule in terms and for reasons which would deny interest here; and they accordingly denied interest in *Moore v. Treasurer*, (1 *id.* 214.)

It may safely be said, that none of the American cases are in favor of allowing interest in this case; but that when all the cases of each Court are considered in connexion, they lay down principles fatal to the present plaintiff's claim, if we except, perhaps, *Lessee of Dilworth v. Sinderling*, (1 *Bin.* 494.)

Whether, therefore, the case be decided by our own decisions, by those of the English Courts, or a majority of American Courts, the result is the same. In *England*, interest is not allowed on monies advanced or received, in any case, unless there is a contract expressed or to be inferred. In most of the *United States*, interest is allowed on monies paid, advanced or received, though there be no contract expressed or to be inferred, where, either, 1. The advance is of a single sum, or all the advances are on one side, and there are no mutual accounts to be settled; or, 2. Where the money has been obtained by fraud, or unreasonably withheld, thereby placing an account for monies, when running and unliquidated, on precisely the same grounds with other running accounts.

We never had the accounts till *October, 1821*. The whole business remained in the dark for years; though there was no excuse for the delay. As agent, it was *Reid's* duty to have accounted annually; at all events, when the factory was destroyed, and the business suspended; yet he continued to keep back the accounts, notwithstanding the request to make them out (in *January, 1819*) until *October, 1821*, 6 years after the business was at an end. The excuse attempted (his habits) instead of extenuating, aggravates the neglect. It is not to be tolerated, that an agent shall withhold his accounts for such a length of time, leave his principal without information; and then set up an enormous claim for interest. Still more unjust is it to give the intestate a reward for his neglect, and visit upon the defendants the effect of his misconduct or misfortunes.

The default is all on *Reid's* part ; yet, by the report, the defendants suffer, and he gains by his laches. A rule so manifestly unjust cannot be supported. The rules of Courts of Equity, as applied by them to agents, may properly be resorted to in this case. These are, 1. That where an agent has received monies, and has promptly exhibited his accounts, and there is no delay on his part, the Court never charge him with interest on monies in his hands ; 2. But where he has delayed rendering his accounts, and is guilty of laches, or other misconduct, the Court of Chancery will charge him with interest on the balance in his hands ; 3. And though a balance may be due him, if he has been guilty of laches, and has not made out his accounts seasonably, he will be deprived, not only of interest, but of commissions, poundage, &c. (*White v. Lincoln*, 8 Ves. 363. *Lady Ormond v. Hutchinson*, 13 Ves. 53. *Pearse v. Green*, 1 Jac. & Walk, 135.) Had we filed our bill against *Reid* in 1821, for an account, and the balance had been found as here, a Court of Chancery would not have given him interest.

ALBANY,
October, 1824.
Reid
v.
Rensselaer
Glass Factory.

For these reasons, the defendants claim that the plaintiff was not entitled to interest until *October*, 1821, when they first became acquainted with their indebtedness.

3. If, however, it should be thought that the intestate was entitled to state an interest account from the commencement of his advances, the question then arises—for how long shall the plaintiff be entitled to claim interest ? for the whole period, as the referees have decided ? or for a stated period ?

We contend that it should be stopped at a reasonable time after the closing of the agency. The factory was destroyed in *May*, 1815 ; and the business was essentially, and, to all practical purposes, closed in *November* of that year. *Reid* charges his salary only to that time ; and should have stated an account the 1st *January*, 1816. Not having done so, interest should cease from that time. At all events, it must be stopped on the 2d *January*, 1819, when the intestate was called upon for his accounts. The authorities and course of argument on the second point apply to this ; and *Dent v. Dunn*, (3 *Campb. Rep.* 296) is in point.

ALBANY,
October, 1824.

Ried
v.
Reusselaer
Glass Factory.

S. A. Foot, contra. The intestate stood in the relation of a trustee or steward, managing all the concerns of the defendants, who were a corporation extensively engaged in the manufacture and sale of glass. The plaintiff's account consists of more than 500 items, involving an amount of upwards of \$100,000. Both the ability and fidelity of this agent, were most manifest throughout the whole term of his engagement; and were not impeached as to any particular, in any material degree. It is now said, that no account of his agency could be procured from him on account of his bad habits. This is an entirely gratuitous assertion. The case says, that no account could be procured on account of his habits, without distinguishing whether they were those of piety, or inebriety. It is also said, that interest ought not, at any rate, to be allowed after the 2d January, 1819, because an account was then demanded. True; but this was by an individual director or directors, after a corporate meeting had broken up, without adopting any resolution on the subject. It was not a request, then, because not a corporate act. It was no more, than if the request had been made by a stranger. Nor is it surprizing that the interest should exceed the principal due, when we look at the enormous amount of the whole account.

The law of interest, has undergone very great changes. The *stat. 3 H. 7*, allowed interest on a judgment affirmed upon a writ of error; and yet the Judges were so conscientious as to refuse carrying it into effect. Till *37 H. 8*, it was unlawful to demand interest; but after the simplicity of barter went off with the middle ages, it began to be allowed on certain demands, and has been gradually extending to others ever since. The statute *37 H. 8*, was the first which tolerated the demand; and from that year till 1812, the decisions of the English courts were strangely contradictory as to the cases in which it might be demanded. If we compare the English and American cases, it will be found that there is no branch of jurisprudence involved in greater obscurity and contradiction. There are but two Judges who have undertaken to lay down any general rule on the subject. These are *Ld. Ellenborough*, and *Mr. Justice Spen-*

er. The rule of the latter will be found in *Liotard v. Graves*, (3 *Caines' Rep.* 226.) He there says, (p. 234) "For goods sold and delivered, unless there be evidence of an agreement to pay interest, none is recoverable until a liquidation of the account takes place. If an account be transmitted by a creditor, and acquiesced in, or assented to by his debtor, it becomes thereby liquidated, and interest is allowable. On money advanced interest is legally demandable. By the usage of a particular trade, interest may be allowed." *De Haviland v. Bowerbank*, (1 *Campb. Rep.* 50) contains Lord *Ellenborough's* rule. He says, "Interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c. ; or where there has been an express promise to pay interest ; or where, from the course of dealing between the parties, it may be inferred that this was their intention ; or where it can be proved that the money has been used and interest actually made."

This rule does not embrace money advanced, or money lent, as such. The case is quoted in *Nrwell v. Griswold* (6 *John. Rep.* 45) to shew merely that interest is not allowable on an unliquidated account for goods sold. *Campbell*, the reporter, appends as many as 20 cases to *De Haviland v. Bowerbank*, as supporting the rule, that interest is not allowable for money had and received ; and it is remarkable that they will just as well support any other rule. Another case decided by *Ld. Ellenborough* is *Crockford v. Winter*, (1 *Campb.* 128) which was an action for money had and received, grounded on the fact that the money was obtained by fraud, which was plainly made out in evidence ; yet interest was denied. But this Court say, in *Amory v. McGregor* (15 *John.* 38) that if there be any *fraud* or gross misconduct on the part of the defendant, interest should be allowed ; and that too in a case where interest would, by no means, be allowed without fraud ; a position directly at war with the case of *Crockford v. Winter*. In *Kingston v. McIntosh* (1 *Campb.* 518) the Court deny interest on a policy of insurance ; and overrule the practice of *Buller, J.* mentioned in *De Bernales v. Fuller* (2 *Campb.* 427 ;) whereas a case in the

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

1 *John. Rep.* 315, decides directly the reverse. In *Gordon v. Swan* (2 *Campb.* 429 in note) and *Atkinson v. Braybrooke* (4 *id.* 380) *Ld. Ellenborough* refused interest in an action for goods sold to be paid for at a particular day ; and in an action on a foreign judgment ; though in *Mountford v. Willes* (2 *B. & P.* 337) it was decided that a debt for goods sold does draw interest after the credit has expired. Yet that case must, it seems, yield to *Ld. Ellenborough's* rule, which is now in daily practice in this state, as to goods sold. In *Thomas v. Weed* (14 *John.* 255) what this Court say, in delivering their opinion, is in direct hostility again to *Ld. Ellenborough's* rule in relation to allowing interest upon money had and received. In *Harris v. Benson*, in 5 *Geo.* 2 (*Str.* 910) the K. B. decided that interest was not allowable on money lent ; but in *Trelawney v. Thomas* (1 *H. Bl.* 303) the C. B. overruled the K. B. on that very point. In *Calton v. Bragg* (15 *East*, 223) in 1812, the decision denied interest on money lent, whereas both money lent and money had and received, are now put on the same footing by our cases, and both carry interest. In *Trelawney v. Thomas*, there was a discussion of considerable length. The demand was for money laid out, and for day wages ; and the Court allowed interest on the former, but denied it as to the latter. In *Walker v. Constable* (1 *B. & P.* 307) and *Tappenden v. Randall* (2 *id.* 467) the C. B. refused interest for money had and received ; but in *Pease v. Barber* (3 *Caines, Rep.* 266) this Court decided directly the reverse. Which is the most reasonable ?

We can turn with pride from the English decisions to those of this Court. It will be found that our own Judges have decided consistently, and entertained enlightened views of the policy and nature of a circulating medium. The principal objection against our recovery of interest is, that our account is open, and that no demand was made till after the intestate's death. In other words, the defendants claim an exemption from the general rule, which is against them, on the ground that the advances of money rest in open account. This is mainly a question of principle. *Liotard v. Graves* is certainly much in point. That, also, was a case

in which no account was rendered, It has been assailed, and its application denied in very strong terms. In reply, I shall merely take the words of the several Judges who delivered opinions. That case came before the Court with a view to the settlement of abstract principles, as a guide to referees who had the subject before them. *Kent*, Ch. J. said, (p. 245) the account was not liquidated, but a naked account current; and interest was allowable only on such items in it as were made for moneys advanced.

ALBANY,
October, 1824.
Reid
v.
Rensselaer
Glass Factory.

The decision of that case, then, was in reference to an account exhibited just before the suit was brought, as here. *Spencer*, J. (p. 234) said he should content himself by laying down principles, and leave the arbitrators to make the application, and then advances the general rule which I have mentioned. *Thompson*, J. says, "With respect to interest on the plaintiffs' account, it appears to me they had a right to charge it on the money advanced. The account cannot be considered as settled, and on that ground carrying interest. It is merely an account current between the parties, and, unless some usage or practice is shewn to warrant the allowance, I should think interest ought not to be calculated except on the money advanced." *Livingston*, J. says, "If there be no special agreement between the parties, or usage of trade between *Amsterdam* and *New-York*, to the contrary, it ought to be allowed on all moneys advanced from their respective payments, and on the goods supplied after such time as is conformable to the course of trade between the two countries."

What, then, is the rule established? Why, that interest is not allowable on an unliquidated account, without an agreement, express or implied; *excepting, however, an account for money advanced, whether liquidated or unliquidated*. Within this exception, interest is due here. *Livingston*, J. was mistaken, in supposing an account previously rendered. The Court do not place themselves on this ground. Had an account been rendered, interest would have been allowed on the whole, as a liquidated account, even for the goods sold, after 3 months, had there been no objection. So material a circumstance could not have esca-

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ped both Court and counsel. Then we come exactly within the principle of that case, when we prove actual advances as charged in our account. Is not this authority conclusive? If fully respected, it certainly is so.

But it is said, that in *Pease v. Barber*, (3 *Caines*, 156) this Court overrule *Liotard v. Graves*. That case decides, merely, that no objection can be made to interest, from the form of the action, and that cases must depend on circumstances.

[*Butler*. I cited that case to establish the latter position only.]

Foot. Before considering *Kanes v. Smith*, (12 *John*. 156) I would ask, what are the general grounds upon which the allowance of interest depends? There are, we conceive, three great principles upon which it may be claimed. 1. An agreement, either expressed or inferrible from the circumstances. Among other examples, under this head, is that of an account sent to the debtor, and not objected to within a reasonable time. Another is, the custom of a particular store at which he trades. 2. A second general ground of the allowance is, the default of the party in omitting what he is bound to do, either by express contract or legal obligation, as upon an express agreement to pay money, at a particular day, for goods, or other consideration, at the expiration of the term of credit, or an implied agreement to pay money, which is received, to another's use, as in *Slingerland v. Swart*, (13 *John. Rep.* 255) and *Lynch v. De Viar*, (3 *John. Cas.* 310) or the legal obligation to pay the price of goods, wrongfully converted, to the right owner, which is recovered in an action of trover. Neither of these principles reach the case of interest for money lent or advanced; and yet the books are full of cases where it has been allowed, not merely from the time of default to pay, on demand. This was never made a criterion in any case. What is the reason of this? When a note is given, or money lent or advanced, generally, without time of payment, it is legally due from the date of the note, loan, or advance. In other

words, it is due presently ; and a suit may be immediately brought. (*Thompson v. Ketcham*, 8 *John. Rep.* 189). 3. The third principle, then, is, that interest is allowed in these two cases, upon the nature of money, and in reference to its use. It is the circulating medium, having a fixed value by law, and when out of one's possession, he loses 7 *per cent.* the legal interest. Hence it should bear interest from the time of the loan or advance. It commands every thing a man has. It gives profit, and may be used in a thousand ways, to make it yield the legal interest. Not so as to merchandize. This lies, for a time, as a dead weight upon the hands of the merchant. Its conversion into money is a work of delay, and depends upon circumstances. In every one of the cases where interest is allowed, on the ground of an account liquidated, it was for things other than money. What is an account? Not a list of cash advances ; but regular entries in relation to dealings of another nature. The books of entry constitute an item of proof in establishing the account before a jury or referees. Not so as to cash advances ; because entries, in relation to these, are not an account, in any sense of the word. (*Vosburgh v. Thayer*, 12 *John. Rep.* 461. *Case v. Potter*, 8 *id.* 212.) You cannot prove them as an account, but only one by one, in the ordinary modes of proof.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

It is said that interest is not due upon an account unliquidated ; and we agree to this, as a general rule. The gentleman cites a great variety of cases to establish and illustrate it, and said that in *Consequa v. Fanning*, (6 *John. Ch. Rep.* 601) the late Chancellor denied interest on cash advances. This is a mistake. There were no cash advances in the case. *Weeks v. Hasty*, (13 *Mass.* 218) is a fair specimen of the rule which allows interest for money paid. The demand was for money paid to J. B. for account of the defendants ; and interest was allowed from the time of the payment. No special circumstances are considered ; but the marginal note is, simply, that " interest was allowed on money paid, where the defendant suffered judgment to go by default."

ALBANY,
October, 1824.

Reid

v.
Rensselaer
Glass Factory.

Thompson v. Stewart, (3 *Con. Rep. N. S.*) is said to be against us ; but that was a question whether interest should be allowed on the avails of goods sold by one having a lien, which lien continued ; and interest was denied during its continuance. *Borret v. Goodere*. (1 *Dick. 428*) was the case of an open mutual account. The rule laid down in *Anonymous*, (1 *John. Rep. 315*) relates to unliquidated damages. *Newell v. Griswold*, (6 *John. Rep. 45*) was an unliquidated account for goods sold ; and *Holliday v. Marshall*, (7 *id. 211*) the case of unliquidated damages. The rule in relation to unliquidated accounts is too limited to reach the point in controversy here. Numerous cases may be supposed where it cannot apply. Take a single loan or a single advance, and the lapse of a year ; ought not interest to be allowed for the whole time ? Would not this make an account equally as an hundred advances, or how many items must an account consist of ? Would this Court ever refuse interest even for goods sold, after a day of payment fixed by the parties ? The gentleman admits that there is an inclination in the American cases to depart from the English rule, by multiplying the instances in which interest shall be allowed. Whether this be so or not, it may be difficult to determine ; but we take the admission.

The case of *Kanes v. Smith*, (12 *John. Rep. 156*) will be found, on a full examination, not to oppose *Liotard v. Graves*, (3 *Caines' Rep. 226*.) It is true, there was a claim of interest, on advances, which was denied ; but this was by reason of a special agreement in the case, upon which a question of construction arose ; and the decision is founded on the circumstances of the case growing out of that agreement. The Court thought the whole case negated any intention to allow interest. The defendant was found not at all in default as to fulfilling his agreement. One item on the debit side of the *Kanes* was the amount of the goods. Another was for moneys advanced, though it will be seen by the case that none was, in fact, advanced. Other charges were for freight and commissions on sale. The plaintiffs were to be reimbursed for all their expenses by the proceeds of wines in the *East Indies*, over which they had the entire control, which they sold and kept an account of ; and upon the whole, it was thought un-

nor to allow interest on more than the balance, and that only from the time when they had rendered an account, and ascertained the balance. From that time only could it be deemed fairly due. The operation was on a very broad scale, and of an uncertain nature. The accounts were like those in *Walden v. Sherburne*, (15 John. 409) *Consequa v. Fanning*, (3 John. Ch. Rep. 601) and *Campbell v. Mesier*, (*id.* 24.) I can find no charge of cash advanced in *Walden v. Sherburne*. In *Campbell v. Mesier*, interest was allowed, and the remark of the Chancellor, that money paid carries interest after demand and default in payment, is true, but it does not go far enough. It is allowable from the time of the advance; for the money is then due.

It is said, among other things, that the intestate should have presented his account in *January*, 1816, in order to claim interest. What rule required this? The gentleman admits there is none, but refers this, with several of his arguments, to the special circumstances of the case. With deference, the doctrine of peculiar circumstances is, in most cases, little better than legal quackery. Philosophy requires us to take a higher and broader view of human transactions; to look at them on a large scale, and govern them by general rules. The contrary was the rock on which the celebrated *Jefferies* foundered. It goes to the root of all legal science, and admonishes us to burn our libraries.

All the monies received were promptly applied; and what benefit could the defendants derive from an exhibition of the account? Have they lost any thing by withholding it? It may be said, perhaps, that they would have paid, but they had, by a formal resolution, abandoned the concern. The cases cited from Chancery are those of receivers or trustees, where the Chancellor denied interest because they were not in default.

It is said that both parties expected the agent would be paid out of the receipts, and even that he had no authority to make advances; but *Reid* was a general agent confined by no limitation; large advances were required. The company understood, or, which is the same thing, were bound to

ALBANY,
October, 1824.
Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid

v.
Rensselaer
Glass Factory.

understand this perfectly. It was known by them that the intestate was making advances ; the books were theirs, and, beyond all doubt, they examined and understood nearly the amount of the arrears. If they omitted this, it was their own fault, for which the agent should not suffer. If knowledge were necessary, the Court will imply that it existed. Could the company have expected that our advances should be gratuitous ? This would be extravagant ; and the strongest expectation of the kind could make no difference. A man sends produce to market ; puts it in deposit ; and takes up money upon it. No doubt he expects it will sell and meet the advance. This is the expectation of both parties ; but was it ever heard that interest should be denied upon the advance, because the avails of the sale happened to fall short of the loan.

The *Lessee of Dilworth v. Sinderling*, (1 Bin. 488) settles this case upon authority. The precise questions here, arose in that case. It was there objected that the account of advances remained open. All the decisions upon the subject were canvassed ; the case was decided on full argument ; and with very great deliberation.

Butler, in reply. I do not rely upon the English authorities in relation to money lent or advanced. I merely adverted to them in order to shew how matters stood in *England*, and for this purpose cited *Calton v. Bragg* (15 East, 224.) That case definitively settles the question, and stops two removes short of allowing interest on monies advanced, and charged in an open account. It is useful as introductory matter to the history of American decisions ; and I am content to submit this case entirely on these. Has any American case gone the length contended for here ? *Lessee of Dilworth v. Sinderling* (1 Bin. 494) goes the farthest ; and even that case is distinguishable in several particulars. Lord *Ellenborough* speaks for himself in *Calton v. Bragg*, to which I refer, in reply to the attack which has been made upon him ; but I agree that our Courts have departed from his rules. This Court did so in *Liotard v. Graves*, which is principally relied upon against us. I will merely add, in relation to this case, that it was not one of a running cash

account. Unless the gentleman finds a case of this kind, he does not reach the present. That was placed on the ordinary ground of money received on one side only ; not as here, a long history of payment and reimbursement. *Pease v. Barber* (3 *Caines' Rep.* 266) was referred to in order to shew that the rule in *Liotard v. Graves* was not intended to be universal, but may be qualified by circumstances. This doctrine, there advanced by *Kent, J.* is pronounced by the gentleman mere legal quackery ; but the same has been often affirmed before, in relation to this subject, by the most distinguished jurists. It will be seen by the American state papers (1 vol. 198, 199, 250, *Boston ed. A. D.* 1792) that *Mr. Hammond*, the British minister, complained to the general government, that interest was not allowed by our courts on claims of the British merchants for debts contracted before the revolutionary war ; although, in the spirit of the treaty and usage between the two countries, it should be allowed, after a year from the time of the contract. *Mr. Jefferson*, then Secretary of State, replied in these words : " Even in *England*, the allowance of interest is not given by express law, but rests in the discretion of Judges and Jurors as arbiters of damages. Sometimes the Judge has enlarged the interest to 20 per cent. per annum. (1 *Ch. Rep.* 57.) In other cases he fixes it habitually one per cent. lower than the legal rate, (2 *Atk.* 343 ;) and in a multitude of cases he refuses it altogether. As for instance, no interest is allowed, 1. On arrears of rents, profits or annuities, (1 *Ch. Rep.* 184 ; 2 *P. W.* 163 ; *Cas. Temp. Talb.* 2 ;) 2. For maintainance, (*Vin. Abr. Interest*, (C. 10 ;) 3. For monies advanced by executors, (2 *Eq. Abr.* 531, 15 ;) 4. For goods sold and delivered, (3 *Wils.* 206 ;) 5. On book debts, open accounts or simple contracts, (3 *Ch. Rep.* 64 ; *Freem. Ch. Rep.* 133 ; *Dougl.* 376 ;) 6. For money lent without a note, (2 *Str.* 910 ;) 7. On inland bills of exchange, if no protest is taken, (2 *Str.* 910 ;) 8. On a bond after 20 years, (2 *Vern.* 458,) or after a tender ; 9. On a decree in certain cases, (*Freem. Ch. Rep.* 181 ;) 10. On judgments in certain cases, as battery and slander, (*Freem. Ch. Rep.* 37 ;) 11. On any decrees or judgments in certain Courts, as the exchequer chamber,

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

(*Dougl.* 753;) 12. On costs, (2 *Eq. Abr.* 530, 7.) And we may add, once for all, that there is no instrument or title to debt so formal or sacred, as to give a right to interest on it under all possible circumstances. The words of *Ld. Mansfield*, (*Dougl.* 753,) where he says, 'that the question was, what was to be the rule of assessing the *damage*, and that, in this case, the interest ought to be the *measure of the damage*, the action being for a debt, but in a case of another sort the rule might be different;' his words (*Dougl.* 376,) 'That interest might be payable in cases of delay, if a jury, in *their discretion*, shall think fit to allow it;' and the doctrine in *Giles v. Hart*, (2 *Salk.* 622,) that damages, or interest, are but an accessory to the debt, which may be barred by circumstances, which do not touch the debt itself, suffice to prove that interest is not a part of the debt; neither comprehended in the thing nor in the term; that words which pass the debt do not give interest necessarily; that the interest *depends altogether on the discretion of the Judges and Jurors*, who will govern themselves by all existing circumstances; will take the legal interest for the measure of their damages, or more, or less, as they think right; will give it from the date of the contract or a year after, or deny it altogether, according as the fault or the sufferings of the one or the other party shall dictate."

One distinction taken on the other side, between the ground of allowing interest on money and goods, is, that the former is the circulating medium of the country, and produces a profit, whereas the contrary is the case with goods. The gentleman takes the precise reverse of the ancient proposition. *Aristotle's* reason for denying interest on money is, that it is barren and unproductive, and, therefore, interest should be denied. (*Vid. Ord on Usury*, 3.) I admit the opposite ground is entitled to about the same weight.

The reason why books of account are not evidence of money lent or advanced is, that they are more rarely made matter of account in the course of business; but surely interest cannot follow from the greater or less degree of strictness in relation to the proof. Nor is the gentleman right in supposing, that in all the cases of denying interest on an open

account, it was for goods sold—not for money. The case of *Campbell v. Mesier*, (6 *John. Ch. Rep.* 21) was of money advanced, but interest was denied till demand. *Porter v. Bussey*, (1 *Mass. Rep.* 438) *Storer v. Storer*, (9 *id.* 37) *Winthrop v. Carleton*, (12 *id.* 4) and *Wyman v. Hubbard*, (13 *id.* 232) are of the same character. So of *Thompson v. Stewart*, (3 *Con. Rep. N. S.* 171.) *Selleck v. French*, (1 *id.* 32) amounts to the same thing. *Jacobs v. Adams*, (1 *Dall.* 50) and *Williams v. Craig*, (*id.* 313) speak the same language. *Moore's Ex'rs. ads. Treasurer*, (1 *Nott & McCord's Rep.* 214) to the same point. These were all cases of money advanced; and yet interest was denied, either totally, or allowed from a certain time subsequent to the money falling due. *Kanes v. Smith*, (12 *John.* 156) was also such a case. Nothing, as supposed, rested upon the agreement of the parties. That provided nothing in relation to interest. The *Kanes* advanced money to buy goods. What else is meant by the term *advances*, as used there? The word itself imports money or its equivalent—not goods. The concern was not so extensive or important as the one involved in the present case; and, though the *Kanes* expected a handsome profit, they were not allowed even interest. In truth, that case is on all fours with the present one.

ALBANY,
October, 1824.
Reid
v.
Rensselaer
Glass Factory.

I have challenged the production of a single case in which interest was ever allowed on a mutual running cash account; and the gentleman has resorted to *Lessee of Dilworth v. Sinderling*, (1 *Bin.* 494) in answer. This is the only case which he produces; and I have admitted that the language and reasoning of the Court is against me. That was ejectment for lands held in trust by the defendant; and the recovery was subject to the payment of his advances as trustee, to be settled by the Court; and the question was, whether he should be allowed interest upon those advances, of which he had kept an account. The Court held that he should; and *Tilghman C. J.* considered this as interfering with the old rule that interest was not allowable on money advanced. Now that question might have been decided, without enquiring whether interest be allowable on an account for money lent or advanced. It was the case of a

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory,

charity : the defendant had no expectation of profit. He could not before account to the children, who were infants. In truth, the case depended upon the principle, that a trustee shall neither make gain, nor be accountable for, nor suffer loss in the management of the trust fund. The present is the case of an agent acting under a very liberal compensation. But if *Lessee of Dilworth v. Sinderling* be, as supposed, against us, it does not overrule the various cases in this state, *Massachusetts, South Carolina, &c.* which stand directly opposed to it. It is but one decision in a Court in this country against all the other Courts ; and Chief Justice *Tilghman* himself, afterwards, in *Brown v. Campbell* (1 *Serg. & Rawle's Rep.* 179) laid down the rule with some qualification. This shews that he did not intend, in the previous case of *Lessee of Dilworth v. Sinderling*, to advance a general rule ; but leave the matter to depend on circumstances.

The rule we contend for may be applied with ease. The term, "open account," has a meaning sufficiently certain, legal and fixed. It is well understood by the law, and the gentleman admits that it is known in the case of goods sold, where interest is denied. It may as easily be known in the case of money advanced ; and is recognized in both cases by the Court of Chancery ; where you cannot go for an account or *ne exeat*, in certain cases resting properly in assumption, unless there be an open running account. The term, therefore, is well understood, and, at any rate, there can be no mistake here. An account of 500 items would, by all the world, be emphatically called an open running one.

Lastly, it is said, that the Court may, nay, will infer an agreement to allow interest, from the circumstances of this case. Perhaps this is the real question in the cause, and it may be necessary to inquire, with a little more particularity, into the state of facts from which Courts will make the inference contended for. What, then, is meant by inferring or implying an intent to pay interest, from the circumstances of the case ? 1. If the parties have been previously engaged in the same business, and interest has been charged and paid, without objection, as where accounts have been sta-

ted and settled, with annual rest, &c. even in the case of goods sold, &c. 2. If it be proved that the custom of trade, in a particular place, is to allow interest, either generally or after a particular time of credit: 3. Or the custom of a particular trade; as the American trade with *England*: 4. Or the practice of a particular merchant, as is every day's practice among us. When these usages are shewn, with the fact that the party had, or might have had knowledge of them, the contract is presumed to have been made with reference to such usage, and an agreement is inferred accordingly. Neither of the cases supposed exist here. The parties never dealt before, and this is a special business—not of such a nature that any general usage could exist. However fit it might have been for *Reid* to have exacted interest, in the event of his being in advance, it is a sufficient answer, to say that he did not do it. This omission is itself the strongest of all possible reasons against inferring an agreement. The nature of the transaction was not such as to warrant the inference. Both parties expected that the receipts would cover the expenditures; otherwise they would not have embarked in the business. If this had not been so, there would have been a special contract with *Reid* to advance. If, then, they did not contemplate *Reid's* advancing, how could they contemplate the payment of interest on advances? At all events, under this strong expectation, that the receipts would cover the advances, it was proper, as in *Kanes v. Smith*, that the defendants should have had notice of the deficiency, before interest began to run. Till this was done, they had every reason to believe that the advances were out of their own funds.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

SUTHERLAND, J. It is admitted, that on the 22d of *March*, 1822, when the report of the referees was made, the defendants were justly indebted to the plaintiff in the principal sum of \$6882,91; and the only error complained of in the report of the referees, is in the interest allowed to the plaintiff. The principle upon which the interest is to be calculated, and the time to which, are the only questions for the determination of the Court.

The question
stated.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

Points settled
by English ca-
ses.

It was justly remarked, at the bar, that there is no subject in the whole range of the English law, on which the authorities are so little in harmony with each other, as on that of interest; and the American authorities are scarcely less contradictory. It may now, however, be considered as settled, in *England*, that no interest is recoverable upon money lent, money had and received, or paid, laid out, and expended, without an express contract for its payment, or proof that the money has actually been used by the defendant, or of special circumstances, from which an agreement to pay interest may be inferred. Where money is lent upon a *written security*, fixing the day of payment, interest is also recoverable from that day. But where goods are sold upon a credit, no interest is recoverable from the time when the credit expires, without an agreement, either express or implied, to pay it.

English cases
stated and con-
sidered.

In *De Haviland v. Bowerbank*, (1 *Campb. Rep.* 50) the question was, whether an agent was responsible for interest upon money had and received, to the use of his principal; and if liable at all, whether interest should run from the time when the money was received, or from the time when payment was demanded. It was held, by Lord *Ellenborough*, Ch. J. that no interest could be recovered; and he stated the rule to be, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specifick agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used. *De Bernales v. Fuller & others*, (2 *Campb. Rep.* 426) was also a case of money had and received. Interest was refused; the rule laid down in *De Haviland v. Bowerbank* was reiterated, and was also stated to have been confirmed by the Court of King's Bench. In a note to this case, *Gordon & others v. Swan & others* is stated, in which the Court of King's Bench determined, that interest is not recoverable in an action for goods sold and delivered, to be paid for at a certain day. *Bayley, J.* observed, that the six months credit was for the benefit of the purcha-

ser, and meant merely that he should not be arrested or sued till the expiration of that time.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

In *Calton v. Bragg*, (15 *East*, 223) the question was, as to a right to recover interest upon money lent. It was argued, that there is a difference between the case of money had and received and money actually lent; but the distinction was repelled by the Court; and, after a consideration of all the authorities, the rule, as laid down by Lord *Ellenborough*, in the cases already cited, was fully sanctioned and established. (*Walker v. Constable*, 1 *B. & P.* 306. *Tappenden v. Randall*, 2 *id.* 472, *S. P.*) His Lordship has been uniform and consistent in the application of this rule; for in *Kingston v. McIntosh*, (1 *Campb. Rep.* 518) he refused interest upon the sum insured in an action upon the policy; in *Atkinson v. Lord Braybrooke*, (4 *id.* 380) he decided, that no interest was recoverable in an action upon a foreign judgment; and in *Crockford v. Winter*, (1 *id.* 129) he refused interest in an action for money had and received, although the money had been obtained by fraud.

Before the time of Lord *Ellenborough*, it had been held, in the case of *Blaney v. Hendrick*, (3 *Wils. Rep.* 205; 2 *Bl. Rep.* 761, *S. C.*) that interest was recoverable upon an account stated, and upon money lent; (*Robinson v. Bland*, (*Bull. N. P.* 274-5, *S. P.*) and in *Trelawney v. Thomas*, (1 *H. Bl.* 305) that it was also recoverable upon money laid out for the use of another, and for money lent, and that the two cases stood upon the same ground of reason, justice and equity; and in *Mountford v. Willes*, (2 *B. & P.* 337) interest was allowed in an action for goods sold, from the expiration of the credit given.

Numerous as have been the cases in *England*, in which this question has been raised and discussed, very little has been said by any of the Judges as to the reason or principle upon which the allowance or refusal of interest depends. Lord *Ellenborough*, and the other Judges who have gone with him upon the subject, seem to consider interest as a demand altogether distinct from, and independent of the original debt; and not as growing out of, or necessarily connected

Little said in English cases as to principle upon which interest is allowable.

Considered a demand distinct from the principal.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

with it.(a) They have, therefore, held that, like every other original demand, it must rest either upon an express or implied promise ; and that such promise can never be implied from the circumstances under which the original indebtedness accrued. Thus, *Grose, J. in Callon v. Bragg*, (15 *East*, 223) says, "It is the lender's own fault, if he do not contract for interest when he advances his money. Why should interest be paid at all, without a contract for it ? If there be no proof of a contract, it might be given against the intention of the parties at the time of the loan. If they did not then contract for interest, it shews that they did not mean to receive it." In *Crockford v. Winter*, (1 *Campb. Rep.* 149) therefore, the Court held, as they were bound in consistency to do, that although the money had been obtained by fraud, no interest could be recovered for it ; because interest is not given by way of damages, but on the ground of contract only.

Why a promise to pay interest should be implied, from a written instrument to pay money by a day certain, and not from a parol promise, as was held by Lord Ellenbrough, in *Gordon v. Swann*, I must confess I cannot understand. The nature of the undertaking is not altered by its being reduced to writing. A parol promise to repay a sum of money borrowed, by a given day, is as obligatory, between the original parties, as though it had been put into the form of a promissory note ; and I can perceive no reason why the breach of the one should not be followed by the same legal consequences as the breach of the other.

Strictness of
English cases
not adopted in
this country.
Cases deci-
ded in New-
York.

The strictness of the English Courts, upon this subject, has never been adopted by this Court, or, I may say, generally, by the Courts of this country. Thus, in *Pease v. Barber*, (3 *Caines' Rep.* 266) it was held, that interest may be recovered under a count for money had and received, against the express decision of the English C. B. in *Walker v. Constable*, (1 *B. & P.* 307) and *Tuppenden v. Randall*, (2 *id.* 472.) The Supreme Court there say, "The action for mo-

(a) The same view is taken of this subject, in Mr. *Jefferson's* letter, cited by *Butler*, arg. in reply, *supra*.

ney had and received, is an equitable action, and the party must shew that he has equity and conscience on his side. The rule, in Equity, is, to allow interest, in many cases, for money had and received.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

In *Liotard v. Graves*, (3 *Caines' Rep.* 234) it was held, by all the Judges, that interest is recoverable upon money paid or advanced, from the date of its advancement; but that, upon an account for goods sold, no interest is recoverable, unless there be evidence of an agreement to pay it, until a liquidation of the account takes place. *Newell v. Griswold*, (6 *John. Rep.* 45) also decides the latter point.

In *Beals v. Guernsey*, (8 *John. Rep.* 446) which was an action of trespass against a Sheriff, for illegally taking the plaintiff's personal property, interest was allowed, *by way of damages*. The Court say, "The plaintiff ought not to be deprived of his property, for years, without compensation for the loss of the use of it; and the jury had a discretion to allow interest in this case, as damages. It has been allowed in actions of *trover*, and the same rule applies in trespass, when brought for the recovery of property."

In *The People v. Gasheris*, (9 *John. Rep.* 71) interest was allowed on money which had been collected and applied, by the testator of the defendant, to his own use, from the time when it ought to have been paid over. The Court advert to the (then) late English decisions, in which interest had been refused on liquidated sums, and on money obtained by fraud, and express their dissatisfaction with them. They say, "*If the defendant retains, and converts to his own use, the plaintiff's money, he ought to pay interest.*" It is allowable in actions for money had and received. In *trover*, for a specifick chattel, the jury may, and, in many cases, ought to allow interest for the detention, by way of damages."

The case of *Kanes v. Smith*, (12 *John.* 156) falls within the principle of unliquidated accounts for goods, &c. The advances made by the plaintiffs were not in money, but in cargoes; that is, in merchandize. The defendant furnished a cargo of wine, which the plaintiff's ship took to the *East Indies*, under a special agreement as to the manner in which the proceeds should be disposed of. One part of the agree-

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ment was, that the plaintiffs should be reimbursed out of the net proceeds of the wines, for their *advances*; and for the surplus of such proceeds, to furnish cargoes to the defendants, or bills on *London*, allowing interest from the time of the sale in India on the overplus; and should the wines not net sufficient to pay the advances, the defendants were to make up the deficiency. Here, then, was a special agreement, on the part of the plaintiffs, to pay interest on the overplus, if the wines should produce more than their advances: but if they should produce less, the defendants were to make up the deficiency. Nothing was said about interest, from which the inference is very strong, that it was the understanding of the parties that they were not to pay interest. It was, therefore, properly disallowed to the plaintiffs, either upon the ground that it was an unliquidated account, in relation to goods, wares and merchandizes, or upon the ground of the special agreement.

Massachusetts
and

The same general principles have been established in *Massachusetts* and *Pennsylvania*. (*Fowler v. Shearer*, 7 *Mass. Rep.* 24. *Wood v. Robins*, 11 *Mass. Rep.* 504. *Weeks v. Hasty*, 13 *Mass. Rep.* 218.) These were actions for money paid, and money had and received, and interest was recovered from the time the money was paid or received.

Pennsylvania.

So in *Rapelie v. Emory*, (1 *Dall. Rep.* 349) interest was allowed on money had and received. It was put upon the same ground as money lent, and held to be clearly distinguishable from the case of goods sold and delivered, where no money passes between the parties. In *Commonwealth v. Crevor*, (3 *Binn. Rep.* 123) *Tilghman*, Ch. J. says, it is considered as settled, that interest shall be recovered against a man who has received the money of another, and holds it against his consent. *The Lessee of Dilworth v. Sinderling*, (1 *Bin. Rep.* 438) is very analagous, so far as the question of interest was concerned, to the one now under consideration. There a trustee was allowed interest upon advances made by him for the use of the *cestuy que trust*. Those advances were part of a general unsettled account with the trust estate, composed of charges for expenses and advances in erecting buildings, &c. on the one side, and of credits for

rent received on the other. The account was of thirty years standing; and the principal advances on which interest was allowed, were made eighteen years before the trial. The *cestuis que trust* were not consulted upon the propriety of making the advances; nor was any account ever rendered by the trustee. It was admitted, that the advances made were judicious and proper; and that the trustee had discharged his trust with fidelity. *Tilghman*, Ch. J. in delivering the opinion of the Court, says, "It seems to have been formerly held, that interest was not allowable on an account for money lent and advanced. That opinion gradually declined, upon more mature reflection, and it may now be affirmed to be the settled law, that interest is recoverable for money lent and advanced. Is there any thing peculiar in this case, to distinguish it from the general rule? If the trustee had borrowed money, he must have paid interest, which would have fallen on the trust estate. Now where is the difference to the *cestuy que trust*, whether interest is paid to the trustee or to a stranger? There is no just cause of complaint, because the jury have allowed interest."

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

These cases appear to me to put the claim of interest upon its true principle. They consider it as a necessary incident to the principal debt; and imply a promise to pay it from the day the *debt* becomes due, if it is not paid. This promise is supported by the universal obligation which rests upon every man to render a just equivalent for the use or detention of that which does not belong to him. The value of money is the legal rate of interest. That, then, shall be paid.

In actions sounding in *tort*, where no contract can be supposed to exist, the same rule of compensation may be adopted for the improper detention of specific articles of personal property; but it shall be given by way of damages, and not as interest.

No interest shall be allowed upon an unliquidated account for goods, wares, and merchandize, without an agreement to allow it either express or implied; because the *balance* of the account, only, constitutes the debt, and, until that is ascertained, there is, strictly speaking, no debt due. This appears from the manner in which an account may be proved.

American cases cited consider interest an incident to the principal debt.

Interest allowed in actions sounding in *tort*.

Interest not allowed on unliquidated account; and why.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

It is not necessary to shew the delivery of each article ; but proof that some were delivered ; and that the plaintiff keeps honest and fair books of account, &c. is evidence of the delivery of all the articles charged in the book. Thus, the whole account is considered as one transaction. But an unliquidated account for money paid, laid out and expended, stands upon a different footing. Each advance of money is a loan, distinct and independent of any other advance. It is not, strictly speaking, matter of account. Each charge must be specifically proved. The proof of several advances, together with the keeping of correct books of account, would not be evidence of the other advances charged in the same account. Each sum paid, or laid out, must therefore be considered a debt, due from the time it is advanced, and, of course, carrying interest, unless there be some agreement to the contrary.

The reason sometimes given, why an unliquidated account should not carry interest, viz. "that the defendant does not know how much he has to pay," can not be the true one. It would be a sufficient answer to it, to say that he can always ascertain the balance by application to the plaintiff. But again, an agreement, either express or implied, to pay interest on the different items of an account, either from the day of their delivery, or after a given credit, will be effectual. But, notwithstanding such agreement, the defendant is as ignorant of the balance of the account, as though it had not been made. If such ignorance, therefore, was the ground for refusing interest, it would not and ought not to be allowed, notwithstanding the agreement. But such agreement breaks up and destroys the individuality of the account, and renders each item a distinct independent debt, due at the time agreed upon, and, of course, carrying interest from that time.

It is settled in this state that interest is allowable on an open mutual cash account.

But whether this reasoning be sound or not, is of very little importance. For I conceive the principle which it is intended to illustrate to be fully established in the cases of *Liotard v. Graves*, and of *the Lessees of Dilworth v. Sinderling & Lewis*, already cited, viz. that an unliquidated account for money paid, or lent, does carry interest. When-

ever it is said, therefore, that no interest is recoverable upon an unliquidated account, an account other than for money lent, or advanced, or had and received, must be understood.

To apply these principles to the case before us. In *May*, 1813, *Reid* entered upon the duties of active agent for the defendants. The case states, "that, at that time, the stock, materials and funds of the defendants were insufficient to *keep the factory in operation ; and large advances were required for that purpose*. No express authority or direction was given to *Reid* to make the advances ; but if they were necessary to keep the factory in operation, and no provision was made by the company for them, an authority to the agent to procure them was necessarily implied. It must be understood that the defendants were well informed of the state of their affairs when *Reid* entered upon the agency. Knowing, then, that advances were necessary to keep the works in operation, and it being the business and duty of the agent to keep them in operation, the fact of his appointment as agent, under such circumstances, implied an authority to make advances, or borrow money for the purpose. His skill and fidelity in the management of the concerns of the company have not been called in question. It is not pretended that the advances exceeded the exigencies of the concern, or that they have not been proved and established with the most scrupulous exactness.

The case states that the debtor side of the plaintiff's account consisted of more than five hundred charges, for distinct advances, each of which was clearly proved. The particular purposes to which the money thus advanced was applied is not stated in the case. That they were such as came within the scope of the authority of a general agent, there can be no doubt, or the plaintiff's demand would have been resisted on that ground. But the only ground of complaint is, that the intestate did not render his account ; and apprise the defendants that it was a losing concern. No reluctance was ever manifested by him to account. His account was never asked for until 1819, when he stated to some of the directors that the company were in his debt ;

ALBANY,
October, 1824.

Reid

v.
Rensselaer
Glass Factory.

Principles applied to present case.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

Interest should
be allowed till
1819.

But not on
salary.

The questions.

Case stated.

But no formal demand of his account was then made. He appears to have exerted himself faithfully and successfully in collecting the funds of the company, and applying them to the discharge of their debt; and there is nothing in the case from which the slightest impression can be derived that the company could or would have made other or more advantageous arrangements, if they had been fully apprised of the state of the account. All the directors, and most of the stockholders of the company, resided in the same city with the plaintiff, where the business was conducted; and it is hardly to be supposed that they were not individually informed of the true state of their affairs, although no formal report was ever made to a board of directors. It appears to me, therefore, that upon every principle of justice and equity, *Reid's* representatives are entitled to interest upon the moneys advanced by him for the use of the company, at least until 1819, when some of the individual directors asked him for his account.

I think he is not entitled to interest upon his compensation as agent. No agreement was ever made as to the amount which he was to receive. His predecessor, it is true, had received \$1250; but the company were not concluded by that circumstance from lessening the compensation to him, if, either from the diminished duties of the station, or the state of their funds, they thought it expedient. There was nothing by which either party was concluded as to the amount of compensation. It could be recovered only upon a *quantum meruit*; and must be considered as an uncertain and unliquidated demand; and, therefore, cannot carry interest until demand made. (*Trelawny v. Thomas*, 1 H. Bl. 305, *per Gould, J.*) With these modifications, I am of opinion that the report of the referees should be confirmed.

SAVAGE, Ch. J. The questions for the decision of the Court are, whether the plaintiff is entitled to interest on any part of her demand; and if any, on what part, and for what time.

To decide these questions correctly, it seems to me important to understand what was the agreement between the

ALBANY,
October, 1824.Reid
v.
Rensselaer
Glass Factory

parties ; and if nothing was expressed as to the mode of carrying on the business, what they must have understood to be the contract between them in this respect. - *Reid* was a stockholder from the organization of the company. He knew, and so did the defendants, how the business had been carried on. Whether it had been profitable while *Kane* was agent, does not appear ; nor whether he made the necessary advances during that time. In 1809, five stockholders took a lease of the works for three years. In *May*, 1812, a partnership was formed between the defendants and *Reid & Alsop*, in which it was stipulated that *Reid & Alsop* should make the necessary advances of money, and receive interest for it. They did so ; but whether the co-partnership was profitable or otherwise, does not appear, except that, on settlement, a balance was due to the defendants.

It is stated in the case, that when *Reid* was appointed agent in 1813, "the stock, materials and funds of the defendants were insufficient to keep the factory in operation, and large advances were required for that purpose." What, then, was the understanding of the parties as to the manner of carrying on the business ? How were those advances to be made, and by whom ? And on what terms ? Without funds the business could not be prosecuted. Had the defendants intended to furnish the necessary funds themselves, they would have made a further call upon the stockholders. Not having done so, they must have intended that the advances should be procured in some other way ; and, of course, by the agent, as he was the only active person engaged in the business, and had, the preceding year, made the advances in the same business. It was certainly no part of his duty, as agent, to make advances from his own funds. Suppose it had not been in his power to do this : the defendants did not furnish them ; and suppose that, under these circumstances, he had borrowed the necessary amount : would it be contended that he should pay the interest himself ? Why should he do this ? was he to be benefitted by the use of the money ? Or was it the defendants, the principals for whom the agent acted, who were to receive the con-

It was understood that the agent should advance—

not for his own benefit ; but for the benefit of his principals ;

ALBANY,
October, 1824.

Reid

v.

Rensselaer
Glass Factory.

And was the
same to them
as if he had
borrowed the
money for
them.

templated profits from the use of the money borrowed? The agent had no farther interest in the profits than as a stockholder. It was the same thing to the defendants, whether they had advanced the funds themselves, or had borrowed them. In the first case, they would have diverted so much money, which was producing them, at least, the interest; in the second, they were taking the interest of their own money to pay the interest of that which was borrowed to carry on the factory: so that whether the agent borrowed the money of others, or advanced his own, was precisely the same thing to the defendants. The interest of the capital employed, is certainly a proper item to charge in ascertaining the profit or loss in the prosecution of any business; and had the business, in this instance, been profitable, I apprehend the objection would not have been thought of. On the other hand, is there any principal of law or justice, which requires an agent to carry on the business of his principal at his own expense?

Whether in-
terest be re-
coverable on
unliquidated
account for
monies.

It was contended on the argument, that interest is not recoverable on an unliquidated account for monies, unless there be an agreement to pay interest, express or implied, or a fraudulent detention or vexatious delay; and that the case under consideration comes within that principle. A review of some of the cases on this subject may be of use.

English cases.

The oldest case cited is that of *Sweatland v. Squire* (2 Salk. 623, A. D. 1699,) where it was said by Powell, J. that interest is recovered by way of damages, when damages are recovered *ratione detentionis debiti*; but not when damages only are recovered; for interest is not recovered *occasione dampnorum*. In the *Attorney General v. The Brewer's Company*, (1 P. Wms. 376, A. D. 1717) the defendants were trustees of a charity; and, by improving the trust estate, had brought the charity in debt. On rendering an account, *Ld. Cowper* refused to allow interest before the confirmation of the master's report; for, until then, it was not a liquidated sum. In *Harris v. Benson*, (2 Str. 910, A. D. 1732) the Chief Justice said interest had never been allowed for money lent, without a note. In *Robinson v. Bland*, (2 Curr. 1085, A. D. 1760) it was decided, that interest was recov-

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

erable on money lent, from the time when it was agreed to be paid. In *Borret v. Goodere*, (1 *Dick.* 428, *A. D.* 1769) Lord *Camden* said there is no instance where interest is given on an open mutual account, without some particular circumstances. That was a case of cash advances, as appears from a full report of it in 6 *Br. P. C.* 364. *Blaney v. Hendricks*, (2 *Bl. Rep.* 761, *A. D.* 1770) allowed interest on an account stated; and the Judges remarked, that it was properly allowable on money lent. In *Trelawney v. Thomas*, (1 *H. Bl.* 304, *A. D.* 1789) *Gould, J.* said interest was recoverable on money lent; and that money laid out for the use of another, and money lent, stood on the same ground in respect to reason, justice and equity, but that no interest should be allowed for work and labour, or goods sold and delivered. Upon the authority of this case, *Livermore*, in his treatise on agency, (vol. 2, p. 17) lays down the rule, that an agent who has advanced money for his principal, will be entitled to interest from the time of the advance. In *Craven v. Tickell*, (1 *Ves. Jun.* 63, *A. D.* 1789) Lord *Thurlow* said, money paid to workmen, who were to have been paid by the defendant, was money advanced for him; and that it was the constant practice at *Guildhall*, either by the contract or in damages, to give interest upon every debt detained. In *Walker v. Constable*, (1 *B. & P.* 307, *A. D.* 1798) the Court were of opinion that, in an action for money had and received, no interest could be recovered. In *Mountford v. Willes*, (2 *B. & P.* 337, *A. D.* 1800) interest was allowed on goods sold, after the term of credit agreed on had expired. In *Tappenden v. Randall*, (2 *B. & P.* 471, *A. D.* 1801) the rule, as previously laid down in *Walker v. Constable*, was adhered to; and *Moses v. M^r Farlan*, (2 *Burr.* 1005) was cited, where it is incidentally said, that the plaintiff can recover no more than the money retained by the defendant, against conscience. In *De Haviland v. Bowerbank*, (1 *Campb. Rep.* 50, *A. D.* 1807) Lord *Ellenborough* said, where money of the plaintiff had come to the hands of the defendant, interest ought not to be recovered, without an agreement, or something from which an agreement might be inferred, or proof that the money had been used. In *De*

ALBANY,
October, 1824.

Ried
v.
Ransselaer
Glass Factory.

Bernales v. Fuller, (2 *Campb. Rep.* 426, *A. D.* 1810) he adhered to the same rule; and the whole Court of K. B. concurred, that the money should not draw interest even after a demand of payment; and afterwards, in *Calton v. Bragg*, (15 *East*, 223, *A. D.* 1812) the same Judge said that *Ld. Mansfield* had sat in the K. B. for upwards of 30 years, and *Ld. Kenyon* for more than 13 years; that he had been there above 9 years; and during all that time, no case had occurred where interest had been allowed upon money lent, without an agreement for it, or for the payment of the principal, at a certain time, or under special circumstances, from which a contract might be inferred.

Pennsylvania.

In *Rapelie v. Emory*, (1 *Dall. Rep.* 349, *A. D.* 1788) it was ruled, by *Shippen*, President, that when one man has received the money of another, and retains it without his consent, it is to be considered in the same light as money lent, and should carry interest. In *Crawford v. Willing*, (4 *Dall. Rep.* 289, *A. D.* 1803) *Smith, J.* said, "Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement, upon the subject of interest, to the honest and rational rule, that wherever one man retains the money of another, *against his declared will*, the legal compensation for the use of money shall be charged and allowed; and that, in the case of goods sold, interest should be allowed after the time of credit had elapsed, and demand of payment was made. In *Lessee of Dilworth v. Sinderling*, (1 *Bin. Rep.* 494, *A. D.* 1808) *Tilghman, Ch. J.* declared the law to be settled, that interest is recoverable on an account for money lent and advanced; and it was allowed to a trustee, upon advances laid out in improvements upon the trust estate, it appearing that the improvements were necessary and proper. In *The Commonwealth v. Crevor*, (3 *Bin. Rep.* 123, *A. D.* 1810) he says, it is settled, that interest shall be recovered against a man who receives the money of another, and *holds it against his consent*. In *Brown v. Campbell*, (1 *Serg. & Rawle's Rep.* 179, *A. D.* 1814) he again says, the rule is, to allow interest where the defendant has *retained the money* of the plaintiff unlawfully, and *against his consent*: that, until the defendant was informed that the plaintiff's money was applied to his

use, he was in no default, and, therefore, ought not to pay interest ; but, being informed, he became a wrong doer in withholding payment, and, therefore, should pay interest.

ALBANY,
October, 1822.

Reid
v.
Rensselaer
Glass Factory.
Massachusetts.

In *Wood v. Robbins*, (11 *Mass. Rep.* 504, *A. D.* 1814) the defendant had fraudulently obtained possession of the plaintiff's money ; and *Putnam*, J. after reviewing most of the authorities, says, there may be cases where interest should not be allowed, as where the defendant was a mere stockholder, ready to pay the money to the party entitled ; but when the defendant has fraudulently obtained the money, or wrongfully detained it, he must be charged with interest. In *Winthrop v. Carleton*, (12 *Mass. Rep.* 4, *A. D.* 1815) the plaintiff, as consignee, made necessary advances, and recovered interest on them *after suit brought*.

In *Connecticut*, as appears by *Selleck v. French*, (1 *Conn. Rep. N. S.* 32, 35, *per Swift*, *J. A. D.* 1814) interest is allowed on the ground of a contract expressed or implied, or as damages for the breach of a contract, or the violation of some duty : *e. g.* 1. Upon an express contract : 2. Upon an implied contract, arising from usage of trade, or former dealings between the parties : 3. Upon a written contract to pay at a day certain, as on bills and notes, and on a policy after the money becomes due : 4. For goods sold, after the time of credit has expired : 5. For money received to the use of another, and *retained contrary to duty* : 6. For money obtained fraudulently, if the tort is waived, and *assumpsit brought* : 7. On a liquidated account : 8. On book account for services performed or articles sold, when, from the nature of the transaction, it appears not to be the intention of the parties that the services or articles were to rest on the footing of a mutual account on book : 9. But where there are mutual accounts, founded on mutual dealings, unless there be some promise or usage to pay interest, it will not be allowed. In such cases, no time of payment is stipulated ; each party is making payment ; the balance is constantly changing ; and the presumption is, that no interest is to be charged. In the case then before the Court, interest was allowed ; there were no mutual dealings ; the advances were all on the part of the plaintiff ; there was no liquidated account, nor promise, nor usage ; but the debt was

Connecticut.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.
United States.
New-York.

due, and payment unreasonably delayed. The particular circumstances of the case are not stated. (See, also, *Thompson v. Stewart*, 3 *Con. Rep. N. S.* 171, 185, *A. D.* 1819.)

In *Gammell v. Skinner*, (2 *Gall. Rep.* 45, *A. D.* 1814) interest was denied on scaman's wages, until after demand made; and where there had been no actual demand, it was held to run from the commencement of the suit.

In this state there have been several decisions on the subject of interest, which apply to most of the questions under consideration. *Liotard v. Graves*, (3 *Caines' Rep.* 226, *A. D.* 1805) is a leading case. There, an account current had been rendered in 1797, containing a charge of interest, which was not objected to in the succeeding correspondence between the parties. *Spencer, J.* says, that for goods sold and delivered, unless there be evidence of an agreement to pay interest, none is recoverable until liquidation; that an account transmitted to a debtor, and acquiesced in, becomes liquidated, and interest is allowable; that on money advanced interest is legally demandable; and so by the usage of a particular trade. *Thompson, J.* said the plaintiffs had a right to charge interest on the money advanced; that the account could not be considered settled, and on that ground carrying interest; that it was merely an account current between the parties; and, unless some usage or practice was shewn, to warrant the allowance, he should think interest ought not to be calculated, except on the money advanced. *Livingston, J.* said, "If there be no special agreement between the parties, or usage of trade to the contrary, it ought to be allowed on all moneys advanced from their respective payments. One account is rendered as early as 1797, in which interest is calculated, and yet no objection is made to it in the succeeding correspondence, from which I conclude such charge consisted with the understanding of the parties." *Kent, Ch. J.* said, "the account exhibited is not an account liquidated, but a naked account current; and interest is allowable only on such items in it as are for moneys advanced, except the usage of trade has provided some particular rules on the subject." At the next term, the case of *Pease v. Barber*, (3 *Caines' Rep.* 266, *A. D.*

1805) was decided. It did not state any facts, but the question was submitted, whether interest could, in any case, be recovered under a count for money had and received. *Kent*, C. J. delivered the opinion of the Court, that interest may be recovered in such an action. He says, there may be cases in which the defendant ought to refund the principal merely; and there may be other cases in which he ought, *ex equo et bono*, to refund the principal with interest. Each case will depend upon the justice and equity arising out of its peculiar circumstances, to be disclosed at the trial. In an anonymous case, (1 *John. Rep.* 315, *A. D.* 1806,) the Court said the general rule is, that interest is not to be recovered on unliquidated damages, or for an uncertain demand. The question arose in an action upon a policy of insurance; and they said it was a case for the discretion of a jury. *Newell v. Griswold*, (6 *John. Rep.* 45, *A. D.* 1810) was assumpsit for goods sold; and there were mutual accounts; but no account stated, or balance struck. The Court said, "there is nothing in the course of dealing between the parties from which an intent or agreement to allow interest can be inferred. It is, therefore, not a case of interest." In *Holli-day v. Marshall*, (7 *John. Rep.* 213, *A. D.* 1810) the plaintiff had procured an appraisal of certain buildings under a covenant in a lease, of which the defendant had notice. The plaintiff claimed interest on the appraisal; but the Court said it was not conclusive; that the value of the buildings was open for inquiry at the trial; and the damages were, therefore, unliquidated; and no interest was recoverable. In *The People v. Gasherie*, (9 *John. Rep.* 71, *A. D.* 1812) a recovery was had for money retained by a loan officer, with interest from the time when he ought to have paid it into the treasury. The Court said, "It is just and reasonable, in itself, that the defendant, who retains and converts the money of another to his own use, should pay interest for that use." And they declared *Crockford v. Winter*, (1 *Campb. Rep.* 128,) and *De Bernales v. Fuller*, (2 *Campb. Rep.* 426) not to be law here. In *Kanes v. Smith*, (12 *John. Rep.* 156, *A. D.* 1815) the plaintiffs, at New-York, sent to the defendants at Madeira, pursuant to an agreement, cer-

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

ALBANY,
October, 1834.

Reid
v.
Rensselaer
Glass Factory.

tain vessels, which were to be employed in carrying wines to the *East Indies*. The plaintiffs were to advance $\frac{1}{2}$ of the invoice price of the wines, to be reimbursed out of their net proceeds; and should these be insufficient to pay the advances, then the defendants were to make up the deficiency. The wines, contrary to the expectation of the parties, did not prove sufficient to reimburse the plaintiffs for their advances; and on the question whether the interest should be allowed upon these, the Court said the plaintiffs were not entitled to interest, *till the deficiency was ascertained and notified to the defendants*; that the wines went in the plaintiffs' vessel; that they alone could ascertain the proceeds, and furnish the accounts of sales to show the balance; *that the defendants were not in default, till the balance was ascertained and notified to them.* *Thomas v. Weed*, (14 *John. Rep.* 255, *A. D.* 1817) was an action of debt upon the statute, against a constable, for not returning an execution. The Court recognize the law that interest is recoverable for money received by the defendant for the plaintiff, or lost by negligence; but the form of the action precluded its allowance in that case. In *Walden v. Sherburne*, (15 *John. Rep.* 424, *A. D.* 1818,) *Spencer, J.* says, "We have uniformly decided, that after an account has been liquidated, it carries interest; and that an account is to be considered liquidated after it is rendered, if objections are not made to it."

In *Campbell v. Mesier*, (6 *John. Ch. Rep.* 24, *A. D.* 1822) Chancellor *Kent* says, "it is the settled rule in the law of this state, that money received or advanced for the use of another carries interest *after a default in payment*; and it is a very reasonable and just rule."

From an examination of these cases, it seems that interest is allowed, 1. Upon a special agreement: 2. Upon an implied promise to pay it; and this may arise from usage between the parties, or usage of a particular trade: 3. Where money is withheld against the will of the owner: 4. By way of punishment for any illegal conversion or use of another's property: 5. Upon advances of cash, on the authority of *Liotard v. Graques*.

Among all the cases examined, however, I do not find any one precisely parallel to the present. Here, both parties were upon the spot, when the business was transacted. The agent acted almost constantly under the eye of his principals. The reason why the Court would not give interest in *Kanes v. Smith*, (12 *John. Rep.* 156.) till rendering the account, was, that the plaintiffs alone knew the fact that the proceeds of the wine did not re-imburse the advances. In this case, it may be said, that *Reid* alone knew he had not been re-imbursed for his advances by the proceeds of the glass. He alone kept the books; but, it is equally certain, that the defendants knew of his advances; and they might have known the state of the accounts, by inspecting the books. They often held their meetings at *Reid's* store, where the books were undoubtedly kept.

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

But was it not his duty, as agent, to have rendered accounts regularly to his principals; and to have kept them advised of the true state of their affairs? There certainly appears to have been a culpable negligence on both sides. The defendants do not seem to have appointed any committee, to examine *Reid's* accounts, as they did *Kane's*, when he was their agent.

The defendants, having agreed to pay interest upon the advances made by *Reid & Alsop*, admitted, in that instance, at least, the propriety of such a charge against them. And, on the whole, I am of opinion, that from the manner in which the business had been done, the year next previous to the appointment of *Reid* as agent; from this being done, with a full knowledge on both sides that large advances were necessary; if the defendants did not mean to pay interest, they ought so to have informed *Reid*, in order that he might not be using a large capital in their service when it was to be totally unproductive to him. Although *Reid* had the means of ascertaining the true state of the accounts, yet he had not the sole means. The defendants were equally able to determine by an inspection of the books whether he had been re-imbursed for his advances. The case does not inform us that any intimation was given by

CASES IN THE SUPREME COURT

ALBANY,
October, 1824.

Reid
v.
Rensselaer
Glass Factory.

Interest should
be allowed till
1st January,
1819, on ad-
vances ;

But not on the
salary.

Reid, of a balance due to him, till the 1st of *January*, 1819, though the factory was burnt on the 3d of *May*, 1815. Nor does it appear, that before the 1st of *January*, 1819, any step whatever was taken by the defendants to ascertain their standing with *Reid*. After that time, *Reid* alone was in fault, as he neglected to furnish an account, and none was rendered till after his death. I think, therefore, that interest is properly chargeable on the monies advanced from the time of such advances ~~respectively~~ to the time when there was an attempt by the defendants to liquidate and settle the account.

As to the compensation for *Reid's* services, no sum was ever agreed upon between the parties ; and his claim for these was never liquidated till it was done by the referees. Interest ought not, therefore, to be allowed on his salary.

WOODWORTH J. being a stockholder in the company, gave no opinion.

Rule.

RULE : That the report of the referees, made in this cause, be set aside, so far as it allows interest to the plaintiff, after the 2d day of *January*, 1819 ; and on the charges for the salary due the intestate ; and that, in pursuance of the stipulation of the parties, the cause be again referred to the referees appointed therein ; and that they calculate, and report the amount due to the plaintiff for interest up to the 2d day of *January* 1819 ; and in addition to the sum reported to be due to her ; and that the calculation be made by allowing interest on the receipts and advances of cash, from the time of making or receiving the same, to the said 2d day of *January* ; and that neither party be allowed, as against the other, costs of the motion to set aside the report.

ALBANY,
October, 1824.

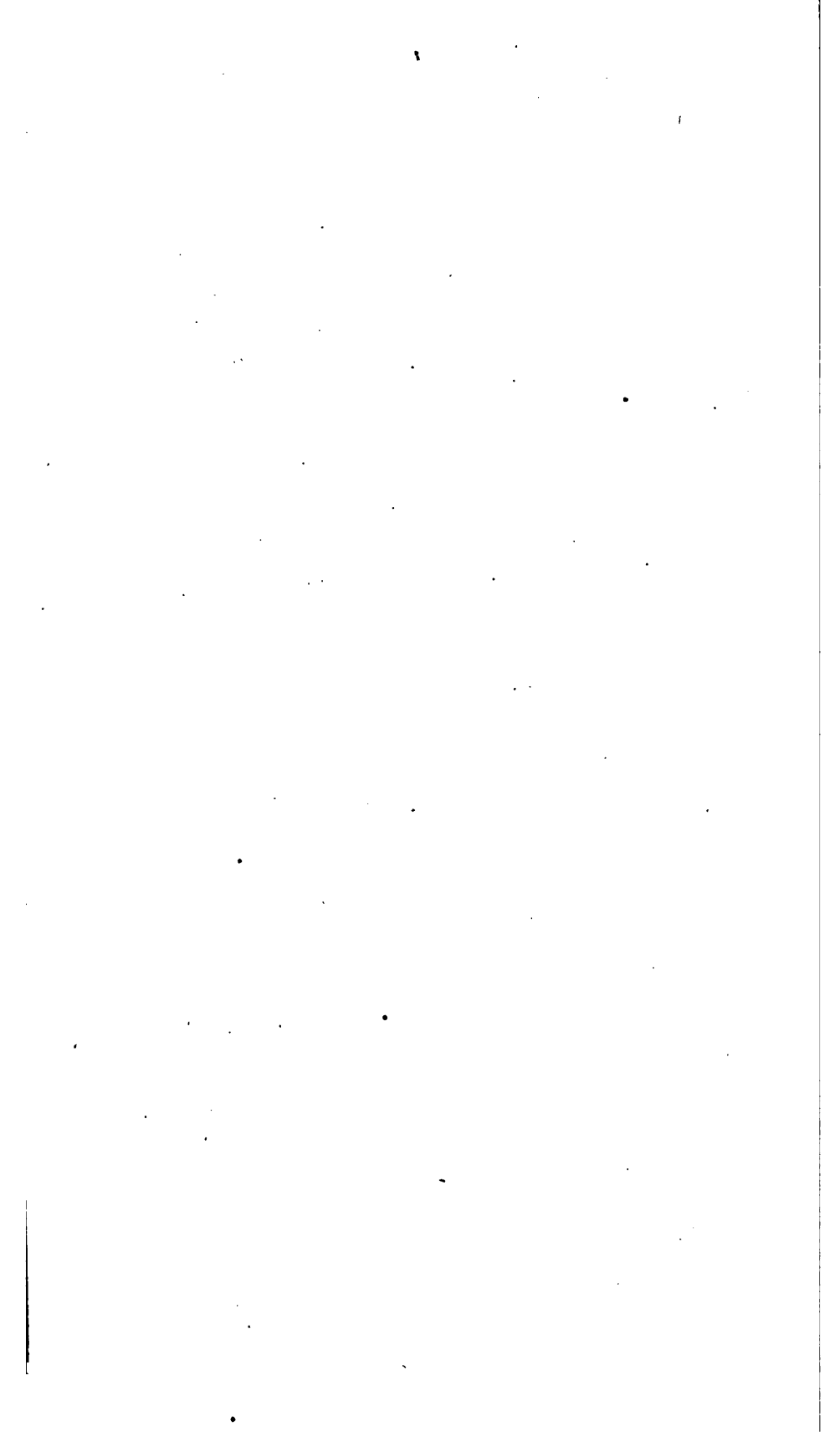
General Rule.

GENERAL RULE.

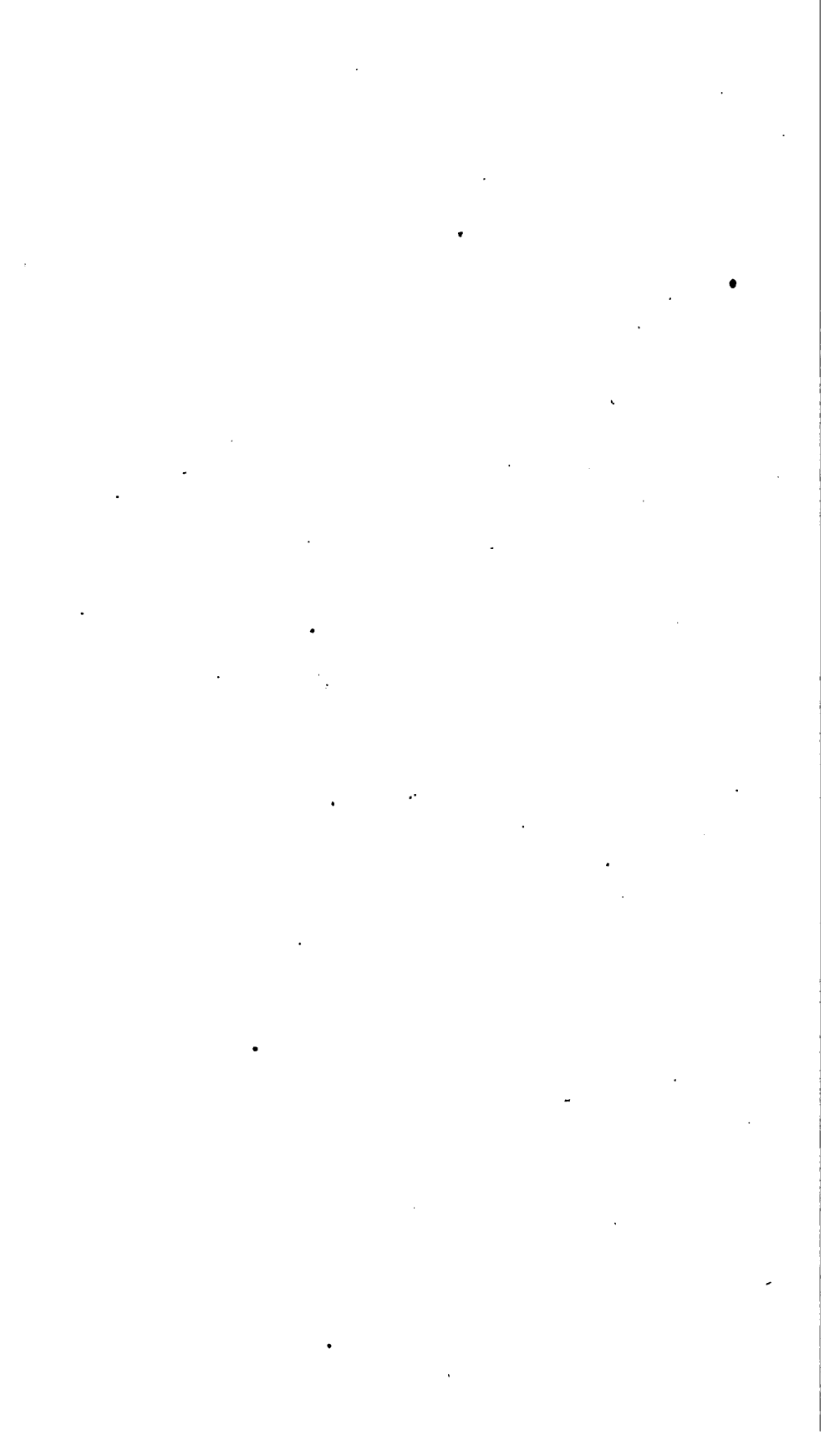
In Supreme Court, *October term,* }
November 13, 1824. }

ORDERED, That when a bill of exceptions is taken at the Circuit, the party obtaining a verdict may notice the bill of exceptions for argument as frivolous, and the same shall have a preference, as in case of a frivolous demurrer, unless the party taking such exception shall, within four days after the trial, or before the same is noticed for argument, obtain, and serve on the opposite party, a certificate of the Circuit Judge, that there is probable cause to stay the proceedings, until the cause is reached in its regular order on the calendar.

END OF OCTOBER TERM.



CASES IN ERROR.



JUDGES
OF THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND THE
CORRECTION OF ERRORS,
DURING THE TIME OF THE FOLLOWING REPORTS.

ERASTUS ROOT, Lieutenant Governor, *President.*
NATHAN SANFORD, *Chancellor.*
JOHN SAVAGE, *Ch. J.*
JACOB SUTHERLAND, } *Justices of the Supreme*
JOHN WOODWORTH, } *Court.*

SENATORS.

FIRST DISTRICT.

WALTER BOWNE,	JASPER WARD,
JOHN LEFFERTS,	DAVID GARDINER.

SECOND DISTRICT.

JOHN SUDAM,	STEPHEN THORN,
JAMES BURT,	WILLIAM NELSON.

THIRD DISTRICT.

CHARLES E. DUDLEY,	EDWARD P. LIVINGSTON,
JAMES MALLORY,	JACOB HAIGHT.

FOURTH DISTRICT.

MELANCTON WHEELER,	ARCHIBALD MINTYRE,
JOHN CRAMER,	SILAS WRIGHT, JUN.

FIFTH DISTRICT.

ALVIN BRONSON,	SHERMAN WOOSTER,
PERLEY KEYES,	THOMAS GREENLY.

SIXTH DISTRICT.

FARRAND STRANAHAN,	TILLY LYNDE,
ISAAC OGDEN,	LATHAM A. BURROWS,

SEVENTH DISTRICT.

BYRAM GREEN,	JONAS EARL, JUN.
JESSE CLARK,	JEDEDIAH MORGAN.

EIGHTH DISTRICT.

DAVID EASON,	JAMES M'CALL,
HEMAN J. REDFIELD,	JOHN BOWMAN.

SAMUEL A. TALCOTT, *Attorney General.*

CASES
ARGUED AND DETERMINED
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
OF THE
STATE OF NEW-YORK,
IN APRIL, 1824.

WILLIAM SEYMOUR, appellant,
against
THOMAS J. DELANCY and others, respondents.

Whether a court of chancery shall decree the specific performance of an agreement, or not, is a matter resting in its discretion; but this is a sound legal discretion.

The party claiming performance must present a case fair, just and reasonable; the contract to be performed must have been entered into upon adequate consideration; and must be free from fraud, misrepresentation or surprise; and it must not be hard, unconscionable, or unequal.

Where the inadequacy of price, in a contract to sell or convey, is so inadequate as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a court of chancery should not carry it into effect.

But inadequacy of price, merely, without being such as to prove fraud conclusively, the contract being entered into deliberately, and fair in all its parts, is not an objection to its being executed.

The cases upon this point of mere inadequacy cited, and the substance of them stated in chronological order; per SAVAGE, Ch. J.

A court of chancery requires stronger reasons for setting aside an agreement, or delivering it up to be cancelled, than would be sufficient to warrant denying a specific performance.

ALBANY,
'April, 1824.

Seymour
v.
Delancy.

So a court of chancery will, in many cases, not disturb an agreement executed, though it might have denied a specific performance.

It will order an agreement to be delivered up to be cancelled for fraud, circumvention, or misrepresentation.

Drunkenness. Cases cited by counsel, upon the question, how far this shall operate as a defence against a bill for the specific performance of a contract.

On a bill filed by the vendor, to compel a specific performance, it is sufficient, if he can make a good title at the time of the decree, unless he has been quickened by the vendee, or time be of the essence of the contract; as where it relates to stocks or personal chattels.

It is, in general, no objection, that the vendor's remedy is gone at law, by reason of there being a mortgage on the estate, &c. so that he could not convey a good title at the day fixed upon by the contract.

Cases to this point cited in their chronological order, per SAVAGE, Ch J.

It is the peculiar province of courts of equity, to interfere, where the remedy is defective at law, if such interference be not against conscience.

On appeal from the Court of Chancery. On the 14th March, 1821, the appellant filed his bill in the Court of Chancery, against the respondents, the real and personal representatives of *Thomas Ellison*, deceased, to compel the specific performance of articles of agreement made between the appellant and *Thomas Ellison*, in his life time, dated Jan. 14th, 1810, by which *Ellison* covenanted that he would, on or before the 1st day of June, 1820, convey to the appellant, in fee, a certain lot, situate in the town of *Montgomery*, and another lot situate in the town of *Walkill*, both in the county of *Orange*, with covenants for quiet enjoyment, and against incumbrances; also, with covenants of seisin and warranty, and for further assurance: in consideration of which premises, the appellant covenanted that he would, on or before the 1st day of June, 1820, convey to *Ellison*, in fee, the one equal undivided third part of two lots in the village of *Newburgh*, in *Orange* county, with a stipulation that each might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use. The parties, shortly after, took possession accordingly, which had continued to the time of filing the bill.

The bill stated that the appellant had always been ready to execute a conveyance, according to his covenant; but set up, as an excuse for not having done it in *Ellison's* life

time, that he was, for several months previous to his death, which happened *August 3d*, 1820, incapable of business ; that some of his heirs were infants, and, therefore, incapable of executing the contract.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

The grounds of defence insisted upon by the answer were,

1. That, before the articles were executed, the appellant had conveyed some part, or the whole of his right in the *Newburgh* lots, to his sister, *Esther Seymour*, and that his title was very questionable :
2. That the bargain or agreement, as contained in the articles, was a most unconscionable one, on the part of the appellant, inasmuch as the lots in *Montgomery* and *Walkill* exceeded the value of the *Newburgh* lots several thousand dollars :
3. That the appellant could not, during the life time of *Ellison*, have made a good title to the *Newburgh* lots ; for that, independent of the questions which existed in relation to the title when the articles were executed, and which remained at the time of the answer, the appellant and his wife had mortgaged these premises to *Thomas Buckley* and *John B. Lawrence*, to secure \$5000, with interest, which remained unpaid till after *Ellison's* death, and until a short time previous to filing the bill :
4. That the appellant had never offered to execute a deed, pursuant to the articles, nor required a deed of *Ellison*, though he was, from the time of executing the articles to the 1st day of *June*, thereafter, when the conveyances were, by the articles, to have been executed, perfectly capable of transacting business.

To this answer, the appellant filed a general replication, and testimony was taken, in the cause, to the above points stated in the answer.

The inadequacy of price insisted on by the answer was established ; to what degree the Judges who passed upon the evidence differed, as will be seen by their opinions. The mortgage upon the *Newburgh* lots was also proved to have existed, as insisted by the answer. Proof was likewise taken as to the mental capacity of *Ellison* to make the bargain in question, the respondents insisting that he was disqualified by habits of intoxication, and the appellant denying this. The evidence upon the point was contradictory. For this I also refer to the opinions delivered, as well as for

ALBANY,
April, 1824.

Seymour
v.
Delancy.

the proof in relation to *Ellison's* capacity to have fulfilled the articles. The testimony in the cause was very voluminous, occupying, in the abstract printed for the use of the Court, more than 100 pages. I forbear stating it, because all that may be material to the questions raised by the counsel or determined by the Court, will be found in the opinions of the Chancellor and Judges.

August 7th, 1822, the Court of Chancery declared, that from the great inadequacy in value of the *Newburgh* lots, compared with the two farms in *Montgomery* and *Walkill*; also from the habits of intoxication in which *Ellison* had indulged in the last years of his life, and the mental debility produced thereby; also from the want of readiness and ability in the complainant, to convey a good and unincumbered title, at the time fixed for the performance of the contract, or at any time after, during the life of *Ellison*; the articles ought not, in equity and good conscience, to be decreed to be carried into effect; and dismissed the bill, with costs.

The late Chancellor *Kent* assigned the reasons for this decree, as in 6 *John. Ch. Rep.* 223 to 235, S. C.

J. Duer, for the appellant, submitted the following points:

Points of fact
raised by
counsel for ap-
pellant.

1. That there was, in fact, no material inadequacy of consideration.

2. That it was a speculation on the part of *Ellison*, and any trifling inadequacy of value that may appear, arises from subsequent circumstances.

3. That, in addition to the evidence afforded by the manner in which the bargain was negotiated, the direct testimony in the cause, as to *Ellison's* competency, is conclusive in favor of the appellant.

4. That the negotiation between the parties was honorably conducted, and the agreement just, fair and equal in all its parts.

After examining the case very fully, in relation to these questions of fact, an outline of which is given in the opinions of the Chief Justice and *Sudam*, Senator, he proceeded to the discussion of the following legal points:

1. That inadequacy of consideration is not, of itself, a sufficient ground to deny a specific performance.

2. That occasional intoxication is no ground of defence in any case, or under any circumstances.

3. The existence of a mortgage upon property agreed to be sold, or conveyed, is no reason for refusing a decree of specific performance ; and the appellant was not otherwise in fault.

4. That the appellant is without remedy at law.

He said, there are two classes of cases, in which a Court of Chancery will enforce the specific performance of a contract : 1. Where the party seeking the performance has lost his remedy at law by accident, or not by his own culpable neglect or omission. In such case a specific execution of the contract ought not to be refused, except upon such grounds as would justify the Court in setting it aside. 2. Inadequacy of price, unless so gross as to be, in itself, evidence of fraud, or unless accompanied by circumstances of fraud or misrepresentation in the party seeking performance, or surprise, ignorance, mistake, delusion, or incapacity of mind on the other side, is no ground for refusing a specific performance.

At law, where a party would recover damages, he must shew a literal compliance with a condition precedent ; but, as an omission of this does not affect the equity of the claim, Chancery will yet relieve. *Davis v. Hone*, (2 Sch. & Lef. 347) lays down the general doctrine on the subject ; and partially illustrates it. *Ld. Redesdale* says, " a Court of Equity frequently decrees specific performance, where the action at law has been lost by the default of the very party seeking the performance, if it be, notwithstanding, conscientious that the agreement should be performed ; as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance ; and, to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case." His lordship refers to a loss

ALBANY,
April, 1824.

Seymour
v.
Delancy.

Points of law
raised by same
counsel.

ALBANY,
 April, 1824.
 Seymour
 v.
 Delancy.

of the remedy by neglect. The interposition of the Court may be still more imperiously called for, where it is gone by the sickness, absence or death of the party. In case of his death, the obligation descends upon the heir. (*Holtham v. Ryland, Nels. Rep.* 205.)

There is a well grounded distinction between cases where the party is wholly without remedy at law, and where, though he has a remedy there, it may be inadequate. In the latter case, if a specific performance be denied, yet, by recurring to his action, he may obtain damages ; but in the former, the reasons for denying a specific performance should be stronger ; for if a remedy is denied in that shape, he must go wholly unredressed. The Chancellor omits to notice this distinction. He takes it for granted that our remedy at law still exists in full force, and speaks of *leaving the appellant to seek his compensation in damages there*. "If (says he) the party be sent to law to submit his case to a jury, relief can be afforded in damages, with a moderation agreeable to equity and good conscience." Thus he, in terms, denies what we think cannot be questioned, that the effect of his decree was to deprive us of all remedy whatever ; because it is not pretended that the articles were so far literally complied with as to save our legal remedy. *Ld. Hardwicke* says, in *Attorney General v. Day*, (1 *Ves. Sen.* 222,) "the general rule certainly is, that this, (carrying a contract into execution) is discretionary in the Court, but will not hold in the present ; for that is generally in cases where there may be an election of two remedies, by coming here for a specific performance, or by action at law ; whereas here there can be no remedy at law." He does indeed say, that on a strong objection, the Court may refuse a decree even in that case ; but this is not at all inconsistent with what he had before said ; or with what we contend for. On a *strong* objection, a contract would not only be denied the aid of Equity, but would be set aside, even after it was executed. If we are entitled to the benefit of his doctrine, in its full and unqualified extent ; if it be true that where the remedy at law is gone, not by neglect, but by accident, as in this case, the reasons for refusing to decree must be of a very strong and

imperative character, and, at least, as strong as will warrant the setting aside a contract, the present cause is disposed of. The only ground upon which the Chancellor proceeds is inadequacy ; and nothing is clearer than that this is no cause for setting a contract aside, unless it be so gross as to warrant the inference of fraud. This the Chancellor admits was not the case. Here was no refusal of performance at the day. The non-performance arose from the sickness of *Ellison*, who, if he had recovered, would doubtless have accepted the conveyance. Under such circumstances, we were not bound to put ourselves in a capacity to tender the deed. (*The counsel contended, from the evidence, that the Chancellor was mistaken in supposing Ellison capable of business on the 1st June, 1820.*)

ALBANY,
April, 1824.

Seymour
V.
Delancy.

But suppose we are mistaken in this view of the subject ; at any rate, the Chancellor had a discretion to grant or refuse the performance ; and we proceed to inquire into the manner in which this has been and should be exercised. The Chancellor says, " it is not a case requiring the aid of the Court *ex debito justitiæ*." If not, then we are subjected to the mere arbitrary discretion, the caprice and humour of the Judge. We had supposed the remedy for a specific performance was to be viewed in a very favorable light ; and to be upheld if possible. It is a remedy alone adequate to the injury received, and good faith mainly depends upon its enforcement. There is an obvious distinction between the case of real and personal property. For the latter, a satisfaction in money may generally be obtained. But purchases of real estate are, many times, the most important transactions of a man's life. They are generally made with a view to settle himself or family. There are a thousand circumstances which a jury cannot reach ; and when the contract is violated, we claim the same right to a specific performance as to damages from a jury. The Chancellor may deny a specific performance, but he cannot do so unless according to established rules. In *Hall v. Warren*, (9 Ves. 608) the Master of the Rolls says, " It is as much of course, in this Court, to decree a specific performance, as it is to give damages at law." And in *Halsey v. Grant*, (13 Ves. 76) Ld.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

Erskine said, "This jurisdiction had its origin upon the foundation of a legal right, the law giving the title; but a Court of law, from the modes in which justice is there administered, not being capable of giving a complete remedy and all the relief to which the party was entitled." How is this reconcileable with the language of *Ld. Eldon*, as quoted by the Chancellor from *Mortlock v. Buller*, (10 *Ves.* 292;) and *Willan v. Willan*, (16 *id.* 83?) There is, in truth, no difficulty or inconsistency in these cases, when understood. No doubt, specific performance may be refused, and the party put to his remedy at law; but there are also cases governed by fixed rules. The discretion to be exercised is not arbitrary. It was said in *White v. Damon*, (7 *Ves.* 30, 35) "that giving specific performance is matter of discretion; but that is not an arbitrary capricious discretion. It must be regulated upon grounds that will make it judicial."

Why is it that specific performance is ever denied? We answer, because there are circumstances which should influence a jury in their estimate of the damages. Unless this is so, the reason fails, and the party has a perfect legal right to a performance. He should not gain an advantage by the choice of his forum; and the only inquiry should be, are there circumstances upon which the case should go to a jury?

To mere inadequacy of price, unless so gross as to be evidence of fraud, or attended with actual fraud, surprise, ignorance, mistake, delusion, or imbecility of mind, *caveat emptor* applies, both in Courts of law and Equity. If the party agree to take real property at a given day, and is not ready to receive it, the vendor may set it up at auction the very next day, and, in an action, recover the difference between the prices of the two sales; or he may enforce the contract, specifically, in Chancery. But what does the doctrine amount to, that mere inadequacy shall be a defence? Do gentlemen mean to say, there must be an exact equality; and abolish, at one blow, the entire equity jurisdiction upon this head? If not, what is to be the degree of inequality? Shall it be $\frac{1}{2}$, $\frac{1}{3}$, or $\frac{1}{4}$? This, it is said, must be referred to

the doctrine of discretion. We ask, is not such a system dangerous, as being arbitrary, and dependent on rules, of which the party is unapprized, till the moment they are promulgated? A doctrine which converts the bench of a Judge into the throne of a tyrant? It is perfectly easy to see whether a contract is such as should be performed. To deny this, is to say we have no moral sense. There is, then, no uncertainty in the rule for which we contend; nor does it place the matter beyond the exercise of a legal and sound discretion, such as may be reduced to practice. There is, on the other hand, an uncertainty in the value of land, and other articles of sale. This must be so, from the nature of things. It is a subject on which witnesses may differ, and always do. If this be the case in *England*, where the value of real property is very nearly fixed, how much more so in this country, where it depends on speculation and contingency.

We also admit that Equity is not bound to decree performance, where the bargain is hard and unconscionable; but this does not follow from the price being inadequate. All the cases which went on this ground, (perhaps with a single exception) beside mere inadequacy, involved moral considerations. The *Marquis of Normanby v. Lord Beckley*, (cited in 5 Vin. 539) as stated by the Chancellor, is, that the contract must be *reasonable and fair in every particular*. This is not a reported case. It is taken from the statement of counsel, unaccompanied with the facts upon which it proceeded. The Chancellor says, it was sanctioned in *Young v. Clerk*, (*Prec. in Ch.* 538) but, in truth, that was a case of actual fraud. Lord *Macclesfield* says, it was "a shameful contract," which marks his sense of the moral turpitude of the transaction. The case in 5th *Viner*, 549, pl. 12, (*Squire v. Baker*) does not tell us what constitutes an unreasonable contract. It purports to have come from Lord *Harcourt*, though it was not found among his manuscripts, but among those of his secretary. (2 *Ves.* 159, 627.) Cases coming from this source have been frequently treated as wanting all authority. This will be seen in *Creuze v. Hunter*, (2 *Ves.* 159) *Connolly v. Parsons*, (3 *id.* 627) and *Mortlock v. Bul-*

ALBANY,
April, 1824.

Seymour
v.
Delancy.

ALBANY,
April, 1824.

Seymour
v.
Dolaney.

ler, (10. *id.* 306, *Sol. Gen. arguendo.*) *Savage v. Taylor*, (*Cas. Temp. Talb.* 234) is next relied on by the Chancellor; but, according to his own statement, fraud was the ground there expressly taken. The articles were unfairly obtained. I do not find, in that case, the words quoted by the Chancellor, *that it would not alter the case, even if possession had been given under the articles*, which may be owing to a difference in the editions which we have examined.

The Chancellor next relies upon *Thompson v. Harcourt*, (2 *Br. Parl. Cas.* 415) and he says, the bill was dismissed, and the decree affirmed in parliament, on the ground of inequality. Now, strange as it may seem, the bill was in that case sustained, and a specifick performance decreed, as appears by the case itself, both in the *old ed. of Br. P. C.* 2 *vol. p.* 415, and in 1 *id. Tomlins' ed.* 193. In that case the parties agreed, on the day of performance, to a postponement; and an act of parliament passed, declaring the contract void, unless the vendor had the whole stock, which he contracted to sell, at the day. The amount sold was £1000, for the consideration of £9200. Two objections were taken. 1. Great inadequacy of price. 2. Want of the whole amount at the day, the vendor having on hand only £290 at that time. For the residue he relied on his being the owner of certain stock, as trustee, to make up the amount; but this was held not to be within the statute. Yet the Court decreed a specific execution as to the £290, thus overruling the objection of inadequacy, and leaving the case, so far from being against us, a decisive one in our favour.

Barnardiston v. Lingwood, (2 *Atk.* 133) was a bill, not to execute but set aside a contract, upon the familiar principle, that it had been obtained from a necessitous remainderman. In *Buxton v. Lister*, (3 *Atk.* 385) the remarks of *Ld. Hardwicke*, as quoted by the Chancellor, will be seen, on an examination of the whole case, to apply solely to contracts concerning personal property. He uses the general words relied on by the Chancellor, as to certainty, fairness and justness, but they have no relation whatever to inadequacy of consideration, as will be seen by adverting to the questions raised in that cause. Yet he gives them the same

force, and quotes them nearly in the same language, as did the counsel in *Mortlock v. Buller*, (10 Ves. 301-2.) Nor did the question arise in *Joynes v. Statham*, (3 Atk. 388.) *The City of London v. Nash*, (1 Ves. Sen. 12 ; 3 Atk. 512, S. C.) was a case of peculiar hardship. The defendant agreed to rebuild houses, under what is called a building lease ; but, instead of doing this literally, he made extensive and valuable repairs. The effect of the bill would have compelled him to pull down the repaired houses ; which, the Lord Chancellor said, might be equal in value to new ones ; and, if not, adequate damages might be given at law. This view of the case shews that it had nothing to do with inadequacy of consideration. In *Underwood v. Hitchcox*, (1 Ves. Sen. 279) I admit that Ld. *Hardwicke* lays stress upon inadequacy of consideration ; but that was by no means the sole ground. The defendant articted with his uncle, for the purchase of a copy-hold in fee ; and the plaintiff soon after agreed with the defendant to purchase of him. The uncle surrendered to the nephew and his wife, and to the heirs of their bodies, remainder to the nephew in fee ; but, notwithstanding the formal title, as derived from the surrender, the plaintiff insisted that the defendant should execute, the uncle being, in fact, a mere trustee for the nephew. Unless the surrender was first set aside, the defendant could not make a good title. The material inquiry was as to the legality of the surrender, therefore, which, as contended, was fraudulent. Ld. *Hardwicke* said, the uncle intended it as a bounty to the family of the nephew ; and, therefore, he would not set it aside, in favour of a purchaser who should take it away from the family. I agree that he does afterwards advert to inadequacy, as a distinct ground, and I am willing the case should be considered an authority against us ; but it is the only one. *Faine v. Brown*, (cited in *Ramsden v. Hylton*) is also relied upon, and stated at large by the Chancellor ; but this is not a reported decision. It was merely cited by counsel, in the course of the argument, and was not recognized as an authority, nor even mentioned by Ld. *Hardwicke*, in the course of the argument, or exam-

ALBANY,
April, 1824.

Seymour
v.
Delaney.

ALBANY,
April, 1824.
Seymour
v.
Delancy.

So a court of chancery will, in many cases, not disturb an agreement executed, though it might have denied a specific performance.

It will order an agreement to be delivered up to be cancelled for fraud, circumvention, or misrepresentation.

Drunkennes. Cases cited by counsel, upon the question, how far this shall operate as a defence against a bill for the specific performance of a contract.

On a bill filed by the vendor, to compel a specific performance, it is sufficient, if he can make a good title at the time of the decree, unless he has been quickened by the vendee, or time be of the essence of the contract; as where it relates to stocks or personal chattels.

It is, in general, no objection, that the vendor's remedy is gone at law, by reason of there being a mortgage on the estate, &c. so that he could not convey a good title at the day fixed upon by the contract.

Cases to this point cited in their chronological order, per SAVAGE, Ch J.

It is the peculiar province of courts of equity, to interfere, where the remedy is defective at law, if such interference be not against conscience.

On appeal from the Court of Chancery. On the 14th March, 1821, the appellant filed his bill in the Court of Chancery, against the respondents, the real and personal representatives of *Thomas Ellison*, deceased, to compel the specific performance of articles of agreement made between the appellant and *Thomas Ellison*, in his life time, dated Jan. 14th, 1800, by which *Ellison* covenanted that he would, on or before the 1st day of June, 1820, convey to the appellant, in fee, a certain lot, situate in the town of *Montgomery*, and another lot situate in the town of *Walkill*, both in the county of *Orange*, with covenants for quiet enjoyment, and against incumbrances; also, with covenants of seisin and warranty, and for further assurance: in consideration of which premises, the appellant covenanted that he would, on or before the 1st day of June, 1820, convey to *Ellison*, in fee, the one equal undivided third part of two lots in the village of *Newburgh*, in *Orange* county, with a stipulation that each might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use. The parties, shortly after, took possession accordingly, which had continued to the time of filing the bill.

The bill stated that the appellant had always been ready to execute a conveyance, according to his covenant; but set up, as an excuse for not having done it in *Ellison's* life

time, that he was, for several months previous to his death, which happened *August 3d*, 1820, incapable of business ; that some of his heirs were infants, and, therefore, incapable of executing the contract.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

The grounds of defence insisted upon by the answer were,
1. That, before the articles were executed, the appellant had conveyed some part, or the whole of his right in the *Newburgh* lots, to his sister, *Esther Seymour*, and that his title was very questionable : 2. That the bargain or agreement, as contained in the articles, was a most unconscionable one, on the part of the appellant, inasmuch as the lots in *Montgomery* and *Walkill* exceeded the value of the *Newburgh* lots several thousand dollars : 3. That the appellant could not, during the life time of *Ellison*, have made a good title to the *Newburgh* lots ; for that, independent of the questions which existed in relation to the title when the articles were executed, and which remained at the time of the answer, the appellant and his wife had mortgaged these premises to *Thomas Buckley* and *John B. Lawrence*, to secure \$5000, with interest, which remained unpaid till after *Ellison's* death, and until a short time previous to filing the bill : 4. That the appellant had never offered to execute a deed, pursuant to the articles, nor required a deed of *Ellison*, though he was, from the time of executing the articles to the 1st day of *June*, thereafter, when the conveyances were, by the articles, to have been executed, perfectly capable of transacting business.

To this answer, the appellant filed a general replication, and testimony was taken, in the cause, to the above points stated in the answer.

The inadequacy of price insisted on by the answer was established ; to what degree the Judges who passed upon the evidence differed, as will be seen by their opinions. The mortgage upon the *Newburgh* lots was also proved to have existed, as insisted by the answer. Proof was likewise taken as to the mental capacity of *Ellison* to make the bargain in question, the respondents insisting that he was disqualified by habits of intoxication, and the appellant denying this. The evidence upon the point was contradictory. For this I also refer to the opinions delivered, as well as for

ALBANY,
April, 1824.

Seymour
v.
Delancy.

are very short. This lot was put up, together with other lots, part of the same estate, at *Gosport*. There was no bidding for that lot. There were bidders for all the other lots. After the sale, *Smith*, the auctioneer, advanced £1000 to the vendor with great security, for he had all the deposits, and the money was to be paid into his hands for all the other lots; so that, except the temporary accommodation, the vendor, whom *Smith* knew to be a distressed man, forced to sell, had no other benefit of that advance. The auctioneer, however, chose to take a better security than he would have had as auctioneer; and he chose to take, as an additional security, a conveyance of this lot, with a power to sell, and his receipt to be a discharge for the price. The manner in which he proceeded was, after having received a considerable part of the money upon the other lots, in 1797, exactly a year, he puts up this wharf and premises, situated at *Gosport*, to sale at *Garroway's*, certainly not without the knowledge, but certainly without the consent of the owner. The place of sale was not very proper, and the time was very rapid. The premises were bought for £1120, and the bill is filed by the purchaser. It appears in proof, and very distinctly, that the value of the premises is upwards of £2000 a year. I have nothing to do with this case in a Court of Equity." What, then, is that case? Is it not the misconduct of the auctioneer, in taking advantage of a distressed man, which is almost solely relied upon as the ground of the decree? Similar ground was taken by Lord *Eldon*, in *Mortlock v. Buller*, (10 *Ves.* 292.)

Such are the authorities on which the Chancellor has founded his opinion. They amount to this, and no more, that Chancery is not bound to decree the performance of a hard and unconscionable bargain. What weight there is in the conclusion which the Chancellor has drawn from them, I shall not, at present, stop to inquire farther; but proceed to the cases upon which we rely, the greater part of which have also been passed upon by the Chancellor.

In *Parker v. Palmer*, (1 *Ch. Cas.* 41) inadequacy was the sole defence; but relief was denied. I do not rely much

on this case. The report of it is obscure ; nor does it appear whether the inadequacy existed at the sale, or arose afterwards. In *City of London v. Richmond* (2 Vern. 421, 423.) the bill was to enforce the specific performance of a contract to take a lease at a rent of £750 ; the real annual value being only £300. The Chancellor said, "as a beneficial bargain will be decreed in Equity, so if it happens to be a losing bargain, for the same reason it ought to be decreed." In the case (cited in *Mortimer v. Capper*, 1 Br. Ch. Cas. 158) by Ld. *Thurlow*, in giving his opinion, the defence was, that the contract was to enclose for £20 ; whereas it was worth £200. This was on a bill for specific performance, and the inadequacy was admitted ; yet it was held no defence. In the argument of *Mortlock v. Buller*, (10 Ves. 298) it is true that Sir *Samuel Romilly*, and other counsel, denied the authority of this case ; but the decision of that cause shews that the Court approved of it.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

Adams v. Weare, (1 Br. Ch. Cas. 567) is not merely analogous, but exactly similar, in all its material circumstances, to the present case, except that it was vastly stronger in the extent of inadequacy, which was the sole defence. The Master of the Rolls decreed a performance, and the decree was affirmed by the Lord Chancellor, who says, (p. 568-9) "I am not very anxious to discuss the point, what bargains the Court will execute or not ; but when the Court has laid it down as an article of the equity which men shall obtain here, and which they cannot obtain at law, that, instead of damages, they shall have a specific performance, and that every agreement must be performed, unless something, at the time of making the bargain, or something done since, is to amount to a waiver of it at the time of carrying it in to execution ; if you do not confine yourself within that limit, there are no bounds whatsoever ; for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as *hard and unconscionable* ; which expressions, unless they are properly to be applied, mean nothing." Again : (p. 570,) "It does not appear to me what the value of the premises would be, if applied to the purpose of working the mill. What the advantage of it might be is not stated. Therefore, I think that without entering

ALBANY,
April, 1824.

Seymour
v.
Delancy.

into the particulars of the case, the Master of the Rolls has done right ; for no case can be cited, where parties have made a bargain with their eyes perfectly open, and no surprise whatever, as in this case, on which the Court has refused to decree a specific performance. Here is no mistake of the object, as in *Hick v. Philipps* ; and, as to the greatness of the price, *Adams* had a right to ask a large sum, and the other had agreed to give it." How strikingly does this observation appeal to the common sense of every man. Has not any one a right, not merely legal and civil, but moral, to ask what he pleases ? and if another, with his eyes open, and on full deliberation, consents to give it, on what ground can a Court of Equity gainsay the deed, and deny performance ?

Collier v. Brown, (1 Cox, 428,) cited by the Chancellor, was the case of an agreement to sell at £275. But the seller repented of his bargain, on an offer, a short time after, of £400. The parties bargained with their eyes open. It was contended, on a bill filed by the purchaser for a specific execution, that it was the constant course, in Courts of Equity, to refuse their assistance in enforcing a contract, where the price was grossly below the real value ; but the Court said, " the parties bargained with their eyes open, and that no imposition or surprise was proved in the case ; that *Mary Turner* was very well satisfied with her bargain, until she found she could get more for the premises ; that under these circumstances, mere inadequacy of price (where it cannot be used as evidence of fraud,) is not, of itself, sufficient to prevent the Court from administering its usual Equity." Here was a direct and solemn decision on the very point we are discussing. The Chancellor supposes that the case went upon its special circumstances. Does he mean to say, that in order to be relieved, one must express his dissatisfaction with the bargain immediately ? Is such a doctrine rational, or consistent with his own view of this case ? Will not the injury be the same, at whatever period the error or delusion is made known ? How is this case ? *Ellison* was satisfied to the time of his death ; and this controversy would, in all probability, never have arisen, had he not died.

Specific performance, on the ground of inadequacy, was resisted in *Emery v. Wase*, (8 Ves. 517) combined with the fact that the lands sold belonged to the defendant's wife ; but *Ld. Eldon* said, " I do not deny that mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific performance of a contract ;" thus laying down our position in terms ; and in *Coles v. Trecothick* (9 Ves. 246) he says, " Inadequacy of price does not depend upon a person giving *pretium affectionis*, from any particular motive, beyond what any other man would give, the reasonable price. But further, unless the inadequacy of price is such as shocks the conscience, and amounts, of itself, to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." The Chancellor thinks this declaration not entitled to much weight, because it was said of a sale at auction ; but the observation was general, and not intended to be confined to sales at auction. The Lord Chancellor speaks of such inadequacy as will shock the conscience ; but sales at auction, at whatever under value, cannot, with any propriety, be treated as having such an effect. This is plain from the manner in which the same Chancellor treated the same subject in the previous case of *White v. Damon*, (7 Ves. 30) where he considers auction sales as standing on peculiar grounds, not to be governed by inadequacy. The rule was also laid down by him, in *Coles v. Trecothick*, as one applicable to all cases.

In *Burrowes v. Lock*, (10 Ves. 470,) the defendant, by will, had a 9th share of the residue of a testator's estate in the hands of a trustee, worth £288 ; and, being indebted to the plaintiff, agreed to assign his interest at £132, being appraised, before the agreement, of the amount due to him. On a bill filed to enforce an assignment, this was resisted on the ground of inadequacy ; but the Master of the Rolls said, " I do not know, if fraud is out of the case, that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price ;" and he overruled the objection, and decreed according to the prayer of the bill. It may be objected, that the Master of the Rolls speaks of

ALBANY,
April, 1824.

Seymour
v.
Delancy.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

setting aside contracts ; but, from the nature of the controversy, this must have been a mere mistake of words. He could mean no other than denying a decree of performance. This is a very strong case. The plaintiff had obtained a contract for the assignment, from the *cestuy que trust*, and was under the necessity of going to a Court of Equity to enforce a specific performance ; but his remedy would have been nearly the same at law, so far as the amount of the recovery was concerned ; and he would have been left to law, had he not come plainly within the rules upon which Chancery decrees performance. The price was palpably inadequate ; yet he was compelled to perform. Nor let it be objected, that the subject was personal property. This is a still stronger feature in our favour ; for specific performance is, in such a case, much less favoured than in cases of real property.

We also rely upon *Cadman v. Horner*, (18 Ves. 10.) This also involved the question of inadequacy. The value of the property agreed to be conveyed was £1200, and the price to be given £600. The Master of the Rolls would, however, evidently have decreed performance, notwithstanding the inadequacy, had it not been that the vendee had been guilty of misrepresentation.

The last case relied upon by the Chancellor, is *Western v. Russell*, (3 Ves. & Beames' Rep. 187) before Sir Wm. Grant, Master of the Rolls, who declares, that " it is unnecessary to determine, as a general question, whether inadequacy of price might, or might not be a ground for refusing performance ; the case before the Court being that of the proprietor of an estate not alleged to have been under any incapacity, or deficiency of judgment, or to have been led, by accident or design, into a misrepresentation of the value." The general question there, then, was not passed upon ; and to make it an authority for the decree, in this case, it must be taken for granted, that the question of inadequacy could never arise, without being blended with others.

Are this Court, then, prepared to say, with the Chancellor, there is a very great weight of authority against us ? Take a summary of the cases upon which he relies. *Young*

v. Clerk was a case of fraud ; *The City of London v. Nash*, does not present the question ; and in *Faine v. Brown* the question of inadequacy did not arise, for the price was not unequal ; *Day v. Newman*, contained other circumstances ; *Tilly v. Peers* rests upon the quotation of counsel ; and in *White v. Damon*, the ground was oppression and injustice : so that he is reduced to the single case of *Underwood v. Titchcox*, (1 *Ves.* 279) which, alone, is a direct authority in support of his opinion.

On the other hand, we present to the Court, not authorities extracted from the statements of counsel, or loose dicta of Judges, but 8 cases, in which the objection of inadequacy was distinctly taken, and overruled, viz. *Parker v. Palmer*, (1 *Ch. Cas.* 41) *City of London v. Richmond*, (2 *Vern.* 421, 3) the case cited in *Mortimer v. Capper*, (1 *Br. Ch. Cas.* 158) *Thompson v. Harcourt*, (2 *Br. P. C.* 415) *Collier v. Brown*, (1 *Cox*, 428) *Emery v. Wase*, (8 *Ves.* 517) *Coles v. Trecothick*, (9 *Ves.* 246) and *Burrowes v. Lock*, (10 *Ves.* 470.)

This is not all. Numerous other cases are not susceptible of explanation, if the ideas of the Chancellor be correct. He takes the naked position, that inadequacy, alone, is enough to stamp the case with the character of hardship, &c. Now, take the numerous class of cases which relate to sales at auction, and inadequacy arising from subsequent circumstances, with cases in which *pretium affectionis* is given. All these are anomalous, if the Chancellor's reasoning be correct. He admits, however, that it does not apply to sales at auction ; but on what ground do Courts refuse to set these aside for inadequacy ? Not of public policy ; because they may be set aside, if fraud intervene ; but because the sale, being open and public, and the parties having a full chance to inform themselves, fraud is not to be presumed from inadequacy, whatever it may be. The same reasons apply to every fair sale, where parties act understandingly. Again : where the property is deteriorated in value, from subsequent circumstances, as in *Pope v. Roots*, (7 *Br. P. C.* 118) *Mortimer v. Capper*, (1 *Br. Ch. Cas.* 156) and *Jackson v. Lever*, (3 *Br. Ch. Cas.* 604) be the inadequacy

ALBANY,
April, 1824.
Seymour
v.
Delancy.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

what it may, yet the contract will be enforced; and the reason is, because, from the nature of the transaction, every presumption of fraud is repelled. So, where the property is purchased with the view to a speculation, as in *Adams v. Weare*, (1 Br. Ch. Cas. 569, cited to this point, 1 Mad. Ch. 324.) Inadequacy can never be a mere abstract question, but must always depend upon the motives and circumstances. Whenever these are peculiar, they are placed on the ground of *pretium affectionis*, where inadequacy, to any degree, is no reason for denying performance.

In the civil law, as stated by the Chancellor, a contract for the sale of land was recinded by judicial authority, though made in good faith, if the price was below half the value. But it will be seen, by 1 *Evans' Polh.* 22, that, even by that law, *pretium affectionis* is excepted. Why such an exception, if the Chancellor be correct? If inadequacy is enough, there is no propriety in the exception. Is it not obvious that the reason of the civil law and our own is the same, viz. the presumption of fraud, which may be repelled by shewing the motive, and, in our own law, any other circumstances?

(Here the counsel examined the facts relied upon to shew that the case was within two of the exceptions to the rule which makes even gross inadequacy evidence of fraud, viz. that the purchase was viewed by *Ellison* as a speculation, from the general belief, prevailing at the time of the bargain, that the *U. S. Navy Yard* would be established at *Newburgh*; and also that it came within the exception of the *pretium affectionis*, *Ellison* having previously bought the other $\frac{1}{2}$ of the property, and having ample means for improving the whole, and rendering it valuable to him far beyond the price which he gave. (See the opinion of *Sudam*, Senator, post.)

It is not competent for the respondents to insist on artifice or misrepresentation. No such defence was set up by the answer; nor is it there pretended that *Ellison* was incapable of contracting. All the answer says is, that he was *occasionally* incapable of business; but this was with a view to answer our excuse for not tendering the deed at the day. The Chancellor is not correct in supposing this to have been set

ALBANY,
April, 1824.Seymour
v.
Delancy,

up as matter of defence. Independently of the purpose for which it was introduced, what do the words import? Do they not imply that *Ellison* was, generally, capable of business? Suppose we should say that his honor the Chancellor was occasionally incorrect; that he occasionally quoted cases, omitting the material circumstances; that he occasionally did this without examining the original cases; but relied on the quotations of counsel; that he occasionally cited cases as being against, when they were for us; would this be to deny his general accuracy, or that he was usually laborious and successful?

Drunkenness can certainly constitute no defence, unless the party, on becoming sober, disavows the contract. This is not proved or pretended. So far from it, there is no doubt that *Ellison* displayed, throughout the business, more than ordinary prudence and capacity.

The Chancellor relies upon the mortgage as another circumstance in the defence, which ought to be taken into consideration. I do not know whether he means that this alone would form a bar; or that it is to be connected with inability and inadequacy; and that the whole, conjunctly, are to preclude the relief sought, or any two of them are to have this effect. But if neither, separately, would do this, how could their union do it? There may be circumstances connected with inadequacy which would require the Court to deny a specific execution; but they are all moral considerations. If inability to make a title at the day, alone, is relied on, I have only to express my astonishment; for there is no doctrine better settled than that this is no bar; and, in nine instances out of ten, the only inquiry is, whether a title can be made at the time of the decree. I admit that neglect without excuse, followed by great delay, may grow into a waiver. So *Ellison* might have rescinded the bargain, by dissent, if there had been a default in tendering the deed without a proper excuse. But so far from dissenting, he left us in quiet possession. In relation to this part of the case, the Chancellor says we should have tendered the deed; for *Ellison* was competent to do business; though he

ALBANY,
April, 1824.

Seymour
v.
Delancy.

had just declared that, for two years before his death, he was incompetent. This was while incompetency was necessary for another head of the defence. When our failure depends upon his competency, the fact is changed, and, by the magic power of the Chancellor, he is suddenly healed. If competency was important at any point of the transaction, it was so at the period when the deed was to have been executed.

In *Langford v. Pitt*, (2 P. Wms. 631) the Master of the Rolls says, "It is sufficient if the party entering into the articles to sell has a good title at the time of the decree, the direction of the Court being, in all these cases, to enquire whether the seller *can*, not whether he *could* make a title at the time of executing the agreement." He refers to the case of *Ld. Stourton v. Sir Thomas Meers*, in which the *Ld. Stourton*, at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the crown; and yet the Court indulged him with time more than once for the getting in this title from the crown, which could not be effected without an act of parliament to be obtained in the following sessions. However, it was at length procured, and *Sir Thomas Meers* decreed to be the purchaser. The same point was resolved in *Wynn v. Morgan*, (7 Ves. 202.)

[*Sudam*, Senator. His honor the Chancellor appears to admit this to be the practice, at the close of his opinion. He says he heard no evidence upon the title; because it is the course of the Court to refer the inquiry on that head to a master.]

Duer. True. This is only another inconsistency. Notwithstanding this admission of the Chancellor, I see the want of title is inserted among the printed points upon the other side. No position is better settled than that a good title in the grantor at the time of the decree is sufficient. No point of practice is more familiar. In *Wynn v. Morgan*, (7 Ves. 203) it was said by the Master of the Rolls, that the defendant did not allege that the execution at the day was material to him, or that he considered it so; but merely that at the day a good title could not be made. He would not

say that a plaintiff could come into Court with a title at any distance of time, though he had none when the contract was made, or should have been executed; but he said he was called on to say, that if he could not make a title at the time fixed on, he never could come for an execution. That, he said, would contradict the whole current of authorities, and would oppose the uniform practice; there was not a single instance of the objection having prevailed, when so nakedly stated. (*The Marquis of Hertford v. Boore*, 5 Ves. 720, S. P.) And in *Mortlock v. Buller*, (10 Ves. 292) one of the cases cited by the Chancellor, Ld. Eldon, at p. 315, lays down the same doctrine as perfectly unquestionable.

ALBANY,
April, 1824.

Seymour
v.
Delaney.

J. V. Henry, (same side) said he would apprise the counsel for the respondents that he should, in his reply, rely upon the following authorities in addition to those cited by his associate counsel:

To show that the mortgage was no impediment to a specific execution, (*Jenkins v. Hiles*, 6 Ves. 646. *Clute v. Robinson*, 2 John. Rep. 595, 614, *Hepburn v. Auld*, 5 Cranch, 262.)

That the want of a remedy at law is a reason for granting relief in Equity, (*Newl. on Con.* 89. *Flint v. Brandon*, 8 Ves. 163, *per Master of the Rolls*.)

As to the objection on the ground of incapacity by reason of intoxication, (1 *Pow. on Con.* 29, 30, and 1 *Mad. Ch.* 239, *Am. ed.* 1817. *Cook v. Clayworth*, 18 Ves. 12.)

That incapacity is not in issue, (*James v. McKernon*, 6 John. Rep. 543.)

Talcott, (Attorney General) for the respondents. (S. *Jones*, same side.) It will be important to remember, that the bill was filed in the Court below, not to set aside, but enforce the specific execution of the contract. In this character, it invoked the extraordinary powers of the Court, and conferred the right and duty of taking into consideration every circumstance, which might render the interposition of the Court unconscientious or inequitable. Though, perhaps, not intoxicated at the time, *Ellison* had, for several years, been in habits of intoxication; the price was grossly inad-

ALBANY,
April, 1824.

Seymour
v.
Delancy.

equate, and the Chancellor was of opinion that it was not right, upon the facts, to decree a specific execution against these infant heirs. Does this refusal deserve the epithets bestowed upon it? Does it deserve to be called the exercise of a power dangerous, and tremendous in its consequences, as referring every thing to discretion; and erecting the seat of a Judge into the throne of a tyrant? What does the language of the Chancellor amount to? Merely that one going into his Court has not a right *ex debito justitiæ* to demand the execution of a contract; because, according to the doctrines of a Court of law, it might be made the subject of an action; but that he has a right to examine the circumstances under which it was made; and be guided by these. This is by no means a novel doctrine, nor is it without the most direct and ample authority in its support. In *Howorth v. Deem*, (1 *Eden's Rep.* 355) the enforcing specific execution is treated as mere matter of discretion. So in *Attorney General v. Day*, (1 *Ves. Sen.* 221, 222,) even where there is no remedy at law; and *Underwood v. Hitchcox*, (1 *Ves.* 279, *S. P.*) So in *Bromley v. Jeffereys*, (*Prec. in Ch.* 138;) and *Carberry et ux. v. Tannehill*, (1 *Harris & Johnson's Rep.* 224.)

In *Perkins v. Wright*, (3 *Harris & M^r Henry*, 326) it is cited in the decree as an established principle in Chancery, that a decree for a specific performance of any contract whatever is not a matter of course, but rests entirely in the discretion of the Court, upon a consideration of all the circumstances; that the Chancellor was acquainted with no precedent of a decree for such a performance, where either the contract appeared hard or unreasonable in itself, or where, from a material change of circumstances since the contract, the performance would be attended with peculiar hardship to the defendant, it being the invariable practice of the Court, in such case, to refer the complainant to his remedy at law." *Simmons v. Hill*, (4 *Harris & M^r Henry*, 258) contains this remark: "How often is it necessary to repeat, that when a contract is established, even by admission, it is still a matter of sound discretion, whether or not, under all circumstances, a performance shall be decreed." The doc-

trine represented as being fraught with such direful consequences, thus comes, on examination, to be a rule so well established, and so equitable, that no one can mistake it ; and none can deny its excellence.

It is said, the Chancellor has inverted cases ; that peculiar circumstances, essential to their decision, are not mentioned by him. On examination, it will be found, he can be defended from these imputations. But, before I proceed to examine the cases cited by him, I call upon the Court to view some of the leading features of the transaction it becomes necessary to investigate. [The counsel here considered the evidence, as to the circumstances from which the contract arose, the inadequacy of value, and the incumbrance upon the *Newburgh* lots, and asked,] Ought such a contract to be carried into execution, unless some imperious rule of the Court demands it ?

It becomes necessary to examine the principles upon which Courts of Equity proceed, in decreeing a specific performance. They operate in a two-fold way, according to the justice and equity of the case. They either rescind the contract, and deprive the party of all remedy, or simply deny all interference. Circumstances which authorize the latter course need not be so strong as those which warrant the former. In the former cases, Courts both of law and Equity have concurrent jurisdiction, as in case of fraud, against which either may relieve ; and the only difference is in the remedy—a Court of Equity cancelling the instrument, and destroying all remedy, and a Court of law merely refusing to enforce it. A Court of Equity sets aside and annuls the instrument ; therefore, and, upon slighter circumstances of impeachment, it may merely refuse to carry it into execution ; or, as is often done, modify the relief sought. In the latter case, it merely refuses the cumulative relief of a Court of Equity, but leaves the party to his remedy at law, if he has any. It follows, from the nature of the subject, that the grounds of relief are different in the two given cases, of enforcing or setting aside. It is absurd to say, that a Court of Equity will require the same evidence, to turn a party round to his legal remedy, on the one hand,

ALBANY,
April, 1824.

Seymour
v.
Delancy.

ALBANY,
April, 1824.

Seymour
v
Delancy.

or cancel all remedy on the other, by going a step farther, rescinding the instrument, and declaring that it ought not to be enforced any where. This distinction has always been recognized, from the origin of Chancery jurisdiction over contracts. (*Savage v. Taylor*, Cas. Temp. Talb. 234. *Day v. Newman*, 2 Cox, 77. *Mortlock v. Buller*, 10 Ves. 292. *Davis v. Symonds*, 2 Cox, 406.) So of all the cases, wherever the question has arisen. The different degrees of evidence are regulated by the different effect and operation of the decree in the two given cases. A decree to set aside a contract may be bottomed on fraud, proved in a variety of ways. One is inadequacy, so gross as to warrant the inference of fraud, according to the cases cited on the other side. It must, then, be such as to shock the judgment of rational men. Where the object is not to annul the contract, but induce the Court to say it shall not be specifically performed, the inadequacy need not be so striking; and when the Court require the same evidence in both cases, they confound and destroy a well settled and ancient distinction. Why should that strong proof be required, to secure the neutrality of the Court, which is necessary to set aside the contract? The very reason why Chancery sends the party back to a Court of law, pre-supposes that the contract is valid, and not to be set aside; and to call for the proof of fraud, in such a case, is absurd. It is calling for what destroys the instrument, in order to warrant the sending it to another forum, with a view that it may be enforced, though to a less rigorous extent. It may be difficult to lay down any general rule, by which this class of cases are to be governed; but thus much may be said, that before the Court of Chancery will lend its gratuitous aid, to compel the execution of a contract, it will be satisfied that the contract is, beyond all doubt, just and fair. The matter must, then, as the Chancellor says, rest in sound judicial discretion. That such is the rule, is established by a multitude of adjudged cases, some of which have been cited by the Chancellor, and some of which he did not think it important to cite. In *Johnson v. Nott*, (1 Vern. 271) decided in 1684, *Hill* purchased of *Nott* a reversion, at an under value. At first the contract was set aside, but the Lord

Keeper reversed that decree. Then a bill was filed to enforce it; but this was denied by the Lord Keeper, who said, "Upon the first hearing, on *Nott's* bill, he thought it a hard case, though he did not see sufficient reason to set aside the contract;" but, as to the plaintiff's bill, he said, "a contract which carries an equity, to have it decreed in specie, ought to be above all objection." As to purchases made of heirs, the subject in relation to which he speaks, I admit the Courts are more strict than where the party is in an independent situation; but the case shews, that there may exist such inadequacy as, though not evidence of fraud, and calling upon the Court to set aside the contract, yet they will be sufficient to warrant them in refusing to give it effect.

It is said, that the expressions *hard* and *unreasonable* could not be applied to simple inadequacy; but the import is perfectly applicable, not only in common sense, but upon authority. What do Courts, and every body else understand, when it is said that a neighbour has made a hard bargain? Is it not, simply, "that he has given too much for the whistle?" *Johnson v. Nott*, (1 *Vern.* 271) is an authority to shew its legal meaning. In the *Marquis of Normanby v. Beckley*, (5 *Vin.* 539) Lord *Somers*, C. had said, long before, that "the Court would not carry agreements into execution, unless the contract was *reasonable* and *fair*, in every particular." Nor is this case answered, by saying it was a quotation of counsel, or questioning the manner in which it found its way before the public. The same distinction was sanctioned by *Green v. Green*, (5 *Vin.* 538) in the House of Lords, A. D. 1710; and the same point is advanced in the *Grounds and Rudiments of Law and Equity*, 76. Whether *Young v. Clerk*, (*Prec. in Ch.* 538) involved actual fraud and corruption, or not, these were not at all relied upon in the decision. Ld. *Macclesfield* said, he was "clear of opinion, that this Court was not bound to decree a specific execution of articles, where they appeared to be unreasonable, or founded on fraud, or where it would be unjust or unconscionable to assist them; that, from the circumstances of this case, these articles were plainly of that sort; that though there was no direct fraud proved, yet, from the *great under-value* of the

ALBANY,
April, 1824.

Seymour!
v.
Delancy.

ALBANY,
April, 1824.

Seymour
v.
Delancy.

land, and that, too, without any expense whatsoever on the plaintiff's part, it appeared to him to be an unreasonable and shameful contract;" thus putting it distinctly on the value of the land. Are the counsel correct, in saying the inadequacy was so gross as to evince fraud? The Court said not—that there was no actual fraud—and is it fair, in determining the weight of a case, to imagine circumstances which might have been, but were not taken into consideration? The Chancellor is not alone in this exposition of *Young v. Clerk*. The same case is cited in *Hick v. Phillips*, (*Prec. in Ch.* 575) and the reason of it given. The defendant, in that case, articted to purchase of the plaintiff an estate, at 35 years, paying £50, the whole estate being represented to be freehold; whereas a part was copy-hold. The plaintiff covenanted to convey, on payment of the purchase money; but, because a part was copy-hold, the defendant refused to go on, and the Ld. Chancellor refused to decree an execution. He said, "Courts of Equity were not bound to assist contracts which were harsh and unequitable, or were attended with such circumstances as would be a hardship on the defendant; that the case was proper for a jury at law, who could mitigate the damages, according to the circumstances, which a Court of Equity could not; and he left the plaintiff to make the most of it at law. It is added, that the plaintiff, in strictness, could not perform. This, by the by, also shows, that the rule of sending or leaving a party to his chance at law, does not depend upon the question, whether, from what appears, he has a remedy there, or not. The case goes on, and the case of *Young v. Clerk* was cited, wherein the over-value of the land was the reason the Court would not decree an execution of the leases; and, for the same reason, ought not, for the over-value of the money in this case; and, therefore, dismissed the bill." This was within two years after the decision in *Young v. Clerk*. The Court not only declare that case to have gone on the value of the land, but they take the same ground themselves.

We are told that the Chancellor has exactly inverted the case of *Thompson v. Harcourt*; that a specific execution was decreed *pro tanto*; but it is the counsel who are mista-

ken. There were two agreements for the transfer of the stock. The last, which was made *October 5th*, 1720, provided that the appellant should, at the next opening the books after *Christmas*, 1720, upon payment of £9200, transfer to the respondent £1000 South Sea stock; and the respondent covenanted to pay the £9200, on that day; and bound himself to this in a penalty of £6000. This was the contract in question. The appellant not having the stock on hand at the time of the contract, except £290, afterwards procured and tendered it at the opening of the books. Being refused, he sued the respondent at law in the Exchequer; and the respondent filed his bill in the same Court for relief against the contract and the penalty. It went through several stages; and, in the mean time, the act of parliament passed, as mentioned on the other side. In *Mich.* term, 1721, the vendor filed a cross bill to compel the specific execution; and the case then stood thus: The vendee's bill was to have the agreement cancelled in consequence of the bursting of the bubble, while the vendor's bill was to have a specific performance; but the decree was in favour of the vendee, who sought the rescission of the contract, on the ground that it was void, except as to the £290. The Court did not set aside the contract, but merely relieved against the penalty, and ordered it to be delivered up; dismissing the bill for a specific execution, and granting a perpetual injunction against proceedings at law. The result, then, was that the vendee was relieved against the penalty on the usual grounds; and the vendor denied the specific performance which he sought. The Court did not find sufficient inadequacy to set aside the contract; but they did find it enough to warrant them in a refusal to decree its specific execution, within the distinction for which we have contended. Another ground was, that the fall in the value of the property, subsequent to the contract, was not a foundation for setting it aside. On appeal, it was argued, that a specific execution should be denied; 1st, upon the statute which had passed; and 2dly, upon the extreme hardship of the case. The decree being no more than a simple affirmance, we cannot see the grounds taken

ALBANY,
October, 1824.
Seymour
v.
Delaney.

ALBANY,
October, 1824.

~~~~~  
Seymour  
v.  
Delaney.

by the Court, except as we guess from the arguments of the counsel. It is cited in 5 *Vin.* 548, as having gone on the grounds supposed by the Chancellor. *The grounds and rudiments of Law and Equity*, (p. 76) supposes it to have gone on that ground. That it did go on this ground is fairly to be supposed from the repeated declarations of those who lived near the time when the decision took place. The case is stated in *Viner*, as coming from the MS. of *Ld. Harcourt*. If we are incorrect in our ground, at any rate, it decides either that when one goes to be relieved against a penalty, he shall first be required to pay what is really due, or that there was not hardship enough to annul the agreement, entirely, on the ground that the stock had subsequently fallen. One of these consequences must follow, from the vendee being held to pay what was secured; and the case cannot possibly be used as an authority against us.

To the case of *Squire v. Baker*, (5 *Vin.* 549, *pl.* 12, *A. D.* 1726) cited by the Chancellor, may be added several cases, to the same point, also cited in the same volume of *Viner*, 533. These cases, it is true, in common with *Squire v. Baker*, are collected from *Ld. Harcourt's* manuscript tables. To diminish their authority, they are called by counsel, the tables of his secretary. Whether so or not, they must have been made under his direction, and for his use. Would he employ a man for this purpose, so inaccurate that his labours could not be relied upon? If so, would he not have corrected them. But, it is most surprizing, that he should have fallen into the same inaccuracy, in 5 or 6 cases given to us from the same source. *Rudiments of Law and Equity*, p. 76, supports the same doctrine. So does *Parnardiston v. Lingwood*. (2 *Atk.* 133.) It is there said, "In the case of a hard bargain, where it is not absolutely executed, but executory only, the constant rule of the Court is, not to carry it into execution." Whether this case related to the question of inadequacy or not, here is an important dictum in favour of the ground taken by the Chancellor. It was insinuated, that he must have taken his view of *Buxton v. Lister*, (3 *Atk.* 385) from the quotation of counsel in *Mortlock v. Buller*, (10 *Ves.* 301-2.) He says, Lord *Hardwicke* remarked, in

ALBANY,  
April, 1824.Seymour  
v.  
Delancy.

that case, "that nothing was better established in Chancery, than that every agreement or contract of sale ought to be certain, fair, and just, in all its parts; and if any of these ingredients were wanting in the case, the Court would not decree a specific performance. It was in the discretion of the Court, whether they would decree a specific performance; otherwise, a decree might be made which would tend to the ruin of one party." In this, he pursues the sense of Lord Hardwicke, (3 *Atk.* 385-6) most strictly and fairly; and uses words which are not found in the quotation of counsel in *Mortlock v. Buller*. He does not profess to quote his Lordship literally; and yet stands perfectly clear of the imputation that he took the case at second hand through the counsel. Whether the Chancellor mistook the case itself, is another question. He is said to have done it, because a previous part of *Ld. Hardwicke's* opinion relates to the specific execution of contracts for goods and chattels; and it is insisted, that the part relied on by the Chancellor relates to the same subject, and should not have been quoted as general, or applicable to contracts for the sale of lands. *Ld. Hardwicke* does, indeed, speak of goods and chattels in one part of his opinion; and reasons against a specific execution of contracts, in relation to them, on the ground of their frequent fluctuation in value—(the very reason, by the by, which counsel here give for enforcing contracts concerning lands,) and he then thinks, that the party may come, in that case, within the rule as to lands; and states what the general rule in relation to these is; declaring also that, with one exception, it is the same as to both lands and chattels. The amount of that case is, then, as stated by the Chancellor. In *The City of London v. Nash* (1 *Ves.* 12) Lord Hardwicke said, in so many words, "the most material objection for the defendant, and which has weight with me, is, that the Court is not obliged to decree a specific performance, and will not, where it would be a hardship.

*Underwood v. Hitchcox*, (1 *Ves.* 279) is admitted to be a case in point for the Chancellor's opinion. There the uncle articulated to sell a copy-hold estate to his nephew, the

ALBANY,  
April, 1824.  
Seymour  
v.  
Delancy.

defendant, who articted to sell to the plaintiff. The estate was then surrendered by the uncle, to the nephew, his wife and family ; and it was contended, that the nephew's taking a conveyance in this form was a breach of trust, and that he should convey notwithstanding ; and that the purchaser might go back to the uncle as trustee. *Ld. Hardwicke* said, " The rule of Equity in carrying agreements into specific execution is well known ; and the Court is not obliged to decree every agreement entered into, though for valuable consideration in strictness of law, it depending on the circumstances. And, undoubtedly, every agreement, of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration." Again : " Nor was the consideration adequate between the uncle and nephew ;" and he expressly declared, that for this inadequacy, both between the uncle and nephew, and the nephew and the plaintiff, a specific performance should not be decreed. *Lord Hardwicke*, then, considers a bargain for an inadequate consideration a hard bargain, within the rule which makes hardship a cause for denying a specific performance. Counsel will certainly not complain, that treating *inadequacy* and *hardship* as synonymous in this case, is novel or extraordinary, after seeing that such a Judge as *Ld. Hardwicke* has done the same thing, of whom it is said, he sat 30 years in the Court of Chancery, and never had a decision reversed by the House of Lords. *Lord Erskine* cites, and relies upon this case, in *Mason v. Armitage*, (13 *Ves.* 37.) *Faine v. Brown*, cited in *Ramsden v. Hyllton*, (2 *Ves.* 304) also relied upon by the Chancellor, went upon the same kind of hardship. It is true, this case depends upon the citation of counsel ; and a reliance upon it is said to be dangerous, for that reason ; but this is by no means the first instance in which it has been relied upon. The same case was quoted in *Howell v. George*, (1 *Mad. Rep.* 1) and *Revell v. Hussey*, (2 *Ball & Beatty*, 287) and the same doctrine will be found in *Gilb. Lex. Pret.* and in *Franks v. Martin*, (1 *Eden's Rep.* 323.) In *Vaughan v. Thomas*, (1 *Br. Ch. Rep.* 556) specific performance was denied by the Chancellor, because, as he said, it would be giv-

ing aid to a very unconscientious bargain, the question turning upon the value of the annuity, which was the subject of purchase ; and in *Collet v. Wollaston*, (3 Br. Ch. Rep. 228) an inquiry into value was directed, before the Master of the Rolls would decree a performance, the reversion appearing to have been sold for a very low price.

*Day v. Newman*, (2 Cox, 77) it is said, depended on other circumstances besides inadequacy ; but none such are relied upon in the decision. Indeed, they are expressly excluded by Lord *Alvanley*, Master of the Rolls, who decided that cause. At page 80, he makes the general distinction for which we contend, between a bill to set aside, and one to enforce a contract. He asks, "Is, then, this such an inadequacy of price as will induce the Court to set aside the contract, or, at least, not to enforce it ? These are the two questions. The inadequacy of price is certainly great, but I am not prepared to say, that it is sufficient to induce the Court to make the party deliver up the contract ; but, I am satisfied, it is a sufficient reason to induce the Court not to decree a specific performance ;" thus relying on inadequacy expressly. At page 81, he denies that there was any hardship, independent of this ; and, at page 82, "I am, therefore, bound to look into that second cause ; and there I find that a bargain was made for buying an estate, at a very inadequate price—so enormous that all mankind must, at the first mention of it, concur in thinking it so. If I had any doubt about the inadequacy of price, I would put it in some mode of inquiry ; but, as the case stands, the value is £9000 ; and then the question is, whether a young man, in this Court, shall be holden to a bargain like this ?" *Howell v. George*, (1 Mad. Rep. 1) again recognizes hardship as a defence. In *Mad. Ch. last ed.* 405, it is said, "a defendant will not be compelled to perform an *unreasonable* contract ;" which is a correction ; for the word was omitted in the corresponding passage of the first edition, though the author inserted it in page 336 of that edition, relative to the same subject.

In *Clitherall v. Ogilvie*, (1 Dess. Eq. Rep. 257) the principles for which we contend are explicitly asserted.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

The case is stated to be clear of all fraud, imposition, or misrepresentation, and the question was, whether, under all the circumstances of the case, the Court would decree a specific execution, or leave the party to his remedy at law. The power of the Court was declared to be discretionary ; not arbitrary, but governed by the rules of Equity ; that though there was no fraud charged, yet, in order to entitle the party to a specific performance, it ought to be fair, certain, just, equal in all its parts, and for adequate consideration ; that if any of these ingredients were wanting, the Court would not decree performance ; and, at pages 258-9, it is said, " though an inadequate consideration may not alone be sufficient to set aside a contract, yet it is a material ingredient, and will go a great way, where the property has been sold for a sum grossly inadequate to its real value. The Court, although it may not go so far as to set aside the agreement, will not, however, lend its aid in compelling a specific performance, but leave the party to his remedy at law, to recover damages for the non-performance." At page 260. " But there is a distinction to be made, between the Court's setting aside an unreasonable contract, after it is executed, and compelling a specific performance of such an one. In the latter case, they will use their discretion with greater liberality than in the former." Again : (261) " Being altogether an executory contract, and the complainant coming here for a specific execution, this Court will not depart from the constant rule in the case of a hard bargain, where it is not absolutely executed but executory only, of refusing to carry it into execution." *Perkins v. Wright*, (3 *Harris & M'Henry's Rep.* 324) contains the same general doctrine ; and in *Campbell v. Spencer*, (2 *Bin. Rep.* 129) the remarks of *Tilghman*, Ch. J. are to the same effect, (*Vid. id. p.* 133.)

In answer to our authorities and arguments, we are told that the doctrine of inadequacy is too vague to be practicable ; that the estimate of men as to the value of property is different ; and, so long as their opinions and habits of life differ, the rule cannot be safely enforced. But the same difficulty exists in other cases, and must exist in many from the na-

ture of things ? In an action, how can the jury assess damages, except upon the opinion of witnesses ? So, upon questions of fraud or surprize, when sent to a jury for trial, they must labour under the same uncertainty ; and, indeed, saying that this contract might go to, and be passed upon by a jury in reference to the damages, gives up the objection. No matter whether we begin with inadequacy or mistake. Gross inadequacy, too, when relied on as evidence of fraud, must be ascertained in some way. If this cannot be done, when it is small, how is it to be reached when large ? Such questions must rest upon the opinions of men, till Courts are more enlightened than they ever can be. The opposite doctrine would preclude all enquiry into value. We must not expect to arrive at demonstrative certainty ; but take the best lights we can obtain.

It is asked, why send the party to law, when, if there be a legal remedy at all, it must embrace as the measure of damages the value of the property, of which a conveyance was refused pursuant to the contract. I need not remark, that even this admits there must be an inquiry into its value. But we deny that the contract price is the only one by which the jury are to be regulated. The cases cited as to hard bargains shew that the jury may give mitigated damages, according to the reason of the case. If the jury had nothing more to do than look at the contract price, all the Chancellors who have made these decisions must have been in darkness. But the rule is a familiar one at law. (*Bac. Abr. Damages, (D) James v. Morgan, 1 Lev. 111. Thornborough v. Whitacre, 6 Mod. 305. Cutler v. How, 8 Mass. Rep. 257. Same v. Johnson, id. 266. Baxler v. Wales, 12 id. 365.*)

As to the cases cited against the doctrine of inadequacy ; *Parker v. Palmer, (1 Ch. Cas. 41)* is not much relied upon by the gentleman himself. It is, indeed, as he says, very obscure, and does not decide the point. *City of London v. Richmond, (2 Vern. 421-3)* was a fall of property in value subsequent to the bargain ; and the anonymous case cited by *Ld. Thurlow, in Mortimer v. Capper, (1 Br. Ch. Cas. 158)* was denied to be law, by *Sir Samuel Romilly, in Mortlock*

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

v. *Buller*, (10 *Ves.* 298,) and correctly. *Ld. Thurlow* says, "I remember a case of a contract for a piece of ground, which was to be enclosed for £20, and, upon a bill for specific performance, the defence was, that it was worth £200. And although the contract was to be performed *in futuro*, yet, neither party knowing the value, the Master of the Rolls decreed a performance." It was a case of *gross inadequacy*, and can never be supported. As to the principal case, the agreement was perfectly fair; and the *Ld. Chancellor* says, in *Mortimer v. Capper*, (p. 157) "to decree for you, I must lay it down as a rule, that where a bargain depends upon a contingent event, which chance both the parties know, if the event turns out against one of the parties, he must be discharged from his contract." This is clear where the party runs the risk of the contingency; and the final opinion is far from sustaining the gentleman's doctrine. The case was referred to a Master to ascertain the value of the annuity, which was the subject of purchase; and the Lord Chancellor puts it on the fairness of the price. All this will be seen at the close of the case. It virtually overrules the anonymous case cited.

The case of *Adams v. Wear*, (1 *Br. Ch. Cas.* 567) is the one principally relied on against us; but it will be found that this case is contradictory and obscure. The vendee purchased with a view to building a mill. The vendor knew nothing of this according to the case; but from *Ld. Thurlow's* opinion, it was plainly in the contemplation of both parties. At page 568, he says he was not very anxious to discuss the point what bargains the Court should execute; that every agreement should be performed unless waived; that the rule should be fixed, and not rest on loose expressions, such as *hard* and *unconscionable*, which expressions, unless properly applied, mean little or nothing. That is true. No words mean any thing unless properly applied. He then goes into the particulars of the bargain; it was objected that, when the bargain was made, the price was three-fourths more than the value; "But," says he, "for aught I know to the contrary, it may be the value." To warrant the erection of the building, consent from the corporation



ALBANY,  
April, 1824.Seymour  
v.  
Delanoy.

of *Bristol* was necessary, and the consent of a *Mrs. Day*; and both parties supposed this might be obtained without difficulty. The vendee agreed to procure it. The value must have been connected with the probability of obtaining it. All the vendee did was to ask *Mrs. Day's* consent; and the Court rely upon this fact; and notice particularly, at page 569, where it looks like the main ground; and the Chancellor said, if that consent should be obtained, the plan might yet be carried into effect. It did not appear but that the mill might have been built, had a competent premium been tendered to *Mrs. Day*; and thus the case turned on *Ld. Thurlow's* inability to decide whether the fair value was given or not. If an authority for the other side, it is opposed to his former opinion in *Mortimer v. Capper*, (1 Br. Ch. Rep. 156.)

It is said *Collier v. Brown*, (1 Cox, 428) decides the abstract point, that inadequacy is no objection. The Court say (p. 431-2) "The parties bargained with their eyes open, and that no imposition or surprise was proved in the case; that *Mary Turner* was very well satisfied with her bargain until she found she could get more for the premises; that, under these circumstances, mere inadequacy of price (where it cannot be used as evidence of fraud) is not, of itself, sufficient to prevent the Court from administering its usual Equity; for if it were, it might be difficult to draw the line, or to say that whenever a better offer is made, it shall not be reason why a former agreement should not be executed." Thus the Court expressly declare that they take the peculiar circumstances of the case as a guide; and they state the circumstances; under which they say inadequacy is not enough. In *Emery v. Wase*, (8 Ves. 517) *Ld. Eldon* said he did not deny that mere inadequacy, though considerable, was not enough; but, he adds, "very considerable difference in value is not inconsiderable evidence that the contract was not made with great care and attention;" and specific performance was denied on another ground. The *dictum* in relation to simple inadequacy was not called for. In *Coles v. Trecothick*, (9 Ves. 246,) *Ld. Eldon* said, "Inadequacy is quite out of the question. The cases of re-

Vol. III. 62

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

versions and interests of that sort, go upon very different principles. In some, the whole duty of making good the bargain, upon the principles of this Court, is upon the vendee; as in the instance of heirs expectant. Inadequacy of price does not depend upon a person giving *pretium affectionis*, from any peculiar motive, beyond, what any other man would give, the reasonable price." The property was sold for £20,000, and the offer was £25,000; in reference to which, he speaks of the *pretium affectionis*, and says that, "unless the inadequacy of price is such as shocks the conscience, and amounts, in itself, to conclusive and decisive evidence of fraud in the transaction, it is not, itself, a sufficient ground for refusing a specific performance." Inadequacy, as he admits, was really out of the question; and the *dictum* in relation to it was *obiter*. Is it true, as he says, that inadequacy, in order to prevail, must be such as to shock the conscience? He not only travels beyond the case, but beyond the law, as it had been long settled by his predecessors; unless it be understood in reference to the particular case, which was an auction sale. So it must be considered; otherwise it goes beyond his own opinion in *White v. Damon*, (7 Ves 31.) There (p. 35,) he says, "the plaintiff is not affected with any thing beyond suspicion; the sale taking place at an auction, without any fraud, surprise or mistake; the estate being offered upon any price he would bid; and without more he became the purchaser. I am inclined to say, that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of price. It will be very difficult to sustain sales by auction, if this Court will not specifically perform the agreement." He ought to be understood as using language with the same view in both cases. *Livingston v. Byrne*, (11 John. Rep. 566) lays down the same doctrine.

In *Burrowes v. Lock*, (10 Ves. 470) a specific execution was decreed, it is true, without regard to inadequacy; but the property in question was already vested in trust. The bargain was executed so far, and the case came within the principle applicable to setting aside contracts. Being executed in trust, refusing to carry it into complete execution

would have been equivalent to setting it aside. *Floyer v. Sherard*, (*Ambl.* 18) gives the true solution of that case. "The next objection," say the Court, (*p.* 19) "was, as to our giving relief; for, in many cases, the Court will not set an agreement aside; and yet not extend any relief. But in the present case, there is no difference between setting it aside, and not giving relief." Again, "In a case of this kind, the Court is as much bound to give its relief, as if it was a legal title, and an action brought at law." So in *Burrowes v. Lock*, there was no chance of reaching the case at law; and, in such case, the refusing to carry into execution, or setting aside, stand upon the same ground. It does not appear, by the case, that there was any covenant upon which the party could have had a remedy at law, or if a warranty of title was implied, there was no question made but the vendor had a complete title; so that this case comes to a question of inadequacy upon an effort to set aside the contract. In *Western v. Russel*, (3 *Ves. & Beam.* 187) the Master of the Rolls said, "It is then alledged that the estate was sold greatly below its fair value; and, upon that ground, there can be no specific performance. Here, again, it is unnecessary to determine, as a general question, whether inadequacy of price might or might not be a ground for refusing performance; the case before the Court being that of the proprioritor of an estate not alleged to have been under any incapacity or deficiency of judgment, or to have been led by accident or design into a misapprehension of the value." This part of his opinion contains all that is material to the case then under consideration. He does not profess to decide upon the ground of inadequacy, but places the decree on entirely a different foundation. Nor does he presuppose that inadequacy was an insufficient ground; but this is connected with surprise. The question of inadequacy, alone, was carefully shunned. Nor was the question decided in *Cadman v. Horner*, (18 *Ves.* 10.) The Master of the Rolls said the allegation of inadequacy was shaken by the defendant's own testimony; and he accordingly took this ground. He would not stop to inquire where the weight of authority lay; but examined the question whether there

ALBANY,  
April, 1824.Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

was inadequacy in fact. *Kien v. Stukeley*, (2 Br. P. C. 396, 398) decides that inadequacy alone is a sufficient objection.

But the case of the respondents does not stand upon inadequacy alone. There are other important circumstances interwoven with it, which, in the language of the Chancellor, are sufficient to overcome the scruples of the most cautious mind. The agreement was obtained from an habitual drunkard, and it is in vain to talk of such a man's acuteness in making a bargain. This is a point sufficiently put in issue. The appellant does not pretend that he was surprised with a defence upon this ground; nor was he, in fact, so surprised. The examination of witnesses was full to this question, by himself, after which he should not be heard to make the objection. (Here the counsel examined the testimony to this point.) That reasonable doubts exist as to the fairness of the transaction, is enough to resist a bill for specific performance. In the language of one of the cases read, "it must be above all objection." It is not necessary, as upon a bill to set the contract aside, that positive unfairness should be shown. The distinction is taken in *Cook v. Clayworth*, (18 Ves. 12. *id.* 14, *note.*) that the Court will not set aside a contract on the ground of intoxication, unless it was procured by the party who seeks to take advantage of it; though it is not necessary to establish this fact in order to avoid its execution. In *Dunnage v. White*, (1 Swanston, 138) even in a contract made with the view to a family arrangement, Sir T. Plumer says (p. 149, 50,) "of the incompetency of J. E. L. there is no satisfactory evidence; the solicitor who attests the deed, proves that he was sober, and under no mental disability; and with regard to undue influence, the evidence is certainly not sufficient to impeach the deed; but as to his general description, there is strong testimony, and all on one side, that he was dissolute, illiterate, addicted to intoxication; that he had recently passed from a low station into the possession of property to which he was not apparently destined; that his course of life rendered him extremely subject to imposition. Such habits, though not constituting absolute incapacity, lay a ground for a strict

examination, &c." So here, if there was not a total alienation, *Ellison's* faculties must have been impaired, and an inability produced.

But the appellant did not, and could not perform the agreement, at the time stipulated by him, nor during *Ellison's* life time; the *Newburgh* lots being then incumbered to their full value, and there being no waiver of time, or indulgence granted, by *Ellison* in his life time, nor by the respondents since his decease.

One bound to sell in fee simple, must covenant against incumbrances. (1 *Mad. Ch.* 339.) A mortgage is such an incumbrance as to excuse a bargainee from completing his purchase. (*Butler v. O'Hear*, 1 *Des. Eq. Rep.* 382. *Judson v. Wass*, 11 *John. Rep.* 525.) We are met by the argument, that the mortgage is now paid, and it is enough that the vendor can make a good title at the coming in of the Master's report, or even at the final decree. This position was considered and refuted in *Alley v. Deschamps*, (13 *Ves.* 225) where the Chancellor entered into the subject very fully, and pronounced it an extravagant doctrine.

The right should be the same, both at law and in Equity. A Court of Chancery is resorted to merely because the remedy is different; but it must be founded on the same right as the remedy at law. If the party is unable to perform at the day, it is true he may be relieved; and there are two cases in which this may be done. 1. Even where the delay is occasioned by circumstances over which the party seeking an execution has no control, he may be relieved, unless the delay be so great as to amount to an abandonment, if the time of execution is not made material by the contract, or no change of circumstances accrue. In one case of this kind, an act of parliament was waited for, to enable the party to convey, this being necessary to warrant the grant of a reversion from the crown. But 2. Where the party is in fault, the whole depending on him, a different rule prevails. This point was considered in *Kien v. Stukely*, (*Gilb. Rep.* 155.) In *Fordyce v. Ford*, (4 *Br. Ch. Cas.* 494) the performance was placed on the ground of acquiescence, and there was no

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

considerable delay; but the Master of the Rolls denied that a vendor was to take his own time.

It is said, the appellant is without remedy at law, in this case, from the lapse of time. If so, it was his own fault. I refer to *Lloyd v. Collet*, (4 Br. Ch. Cas. 469; 4 Ves. 689, 690, note (b) S. C.) In the latter book, Lord Loughborough is reported to have said, "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed; and that it should be certainly known when a man is bound and when not. There is a difficulty to comprehend how the essentials of a contract should be different in Equity, and at law. It is one thing to say, the time is not so essential that in no case, in which the day has by any means been suffered to elapse, the Court would relieve against it and decree performance—The conduct of the parties, inevitable accident, &c. might induce the Court to relieve. But it is a different thing to say, the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it. In most of the cases, there have been steps taken. Is there any case in which, without any previous communication at all between the parties, the time has been suffered to elapse? I want a case to prove, that where nothing has been done by the parties, this Court will hold, in a contract of buying and selling, a rule that certainly is not the rule at law, that the time is not an essential part of the contract. Here no step has been taken, from the day of the sale, for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? It is true, the plaintiff must have considered himself bound after the day. So he was. He could not take advantage of his own neglect. He says, 'by my own default this contract is void in law—I cannot succeed at law—on the contrary, the other party is entitled to recover back the money he has paid in expectation of the execution of his contract—therefore, an equity arises to me.' An equity out of his own neg-

lect! It is a singular head of equity." So, in this case, the party is not able to perform, because he does not make himself so. In *Benedict v. Lynch*, (1 *John. Ch. Rep.* 370, 375) the Chancellor acknowledged the rule as laid down by *Ld. Loughborough*, and repeats and adopts it in terms; and (p. 375) he declares the general rule to be, that a party coming after the day for performance, cannot be heard, unless he justify the delay by a substantial excuse; and where he has omitted to perform by the day, without such excuse, and there has been no acquiescence on the other side, he will not be relieved; in support of which he cites *Newland on Contracts*, 342, and *Sugden's L. of Vend.* 3d *Lond. ed.* 268; *Milward v. Earl Thanet*, (5 *Ves.* 720, in note, S. P.)

The only questions are, what was to be performed by the appellant, and whether his omission was excused. He has done nothing; and before he could call for an execution of the contract, he should have put himself in a situation to perform it on his part, by cancelling the mortgage. True, this was done before bill filed; but the appellant should have been ready, in this case, at the day. I cite to this point, *Colson v. Thompson*, (2 *Wheat. Rep.* 336, 341.) *Hepburn v. Auld*, (5 *Cranch*, 262) was cited by Mr. Henry, to shew that time was immaterial; and, it is true, the general doctrine is laid down there, and in *Hepburn v. Dunlop*, (1 *Wheat.* 179.) These cases may be supported on the ground of waiver; though they seem more properly to come within the distinction we have advanced, that where the party cannot be able to perform by any act exclusively his own, he shall be excused; but not where the fault arises entirely from his own neglect. Suppose we admit, then, that the appellant's remedy is gone at law; the whole loss is owing to himself. To permit one to claim equity for want of a remedy at law, which he himself has thrown away, would be most extraordinary. The appellant calls on the Court to relieve him, because he has not done his duty. The rule, that Equity will relieve, upon the ground of there being a want of all remedy at law, does not apply. The cases where Equity has disregarded time, are those where the party has lost his remedy, without his own mere neglect. It is, indeed,

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

a strange equity, as *Ld. Loughborough* said, which is to grow out of the negligence of the party who seeks it.

But suppose, for the sake of argument, that Equity would originally have relieved, under such circumstances; it will not do so where the specific performance becomes a hardship, from a change of circumstances. The plans for improvement, which would alone prevent almost a total loss of the property, are defeated by *Ellison's* death. His wife and children cannot enter into his commercial views. Take what is said in *Seton v. Slade*, (7 *Ves.* 274) for a guide—"The title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing, or objections arising out of circumstances, not merely as to time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing that the objection cannot be maintained." Take what is here said, as a criterion—the Court cannot help seeing that here is a change of circumstances. The expectation (if any) of a rise in value, from the establishment of a navy yard at *Newburgh*, is defeated.

The counsel have great difficulty in seeing how, if inadequacy alone be an insufficient objection, it should be different, when taken in connexion with lapse of time, or the other circumstances in the case, any one of which would not, alone, be a sufficient defence. But the Chancellor is not singular in taking this ground. Both *Powell* and *Sugden* take the same view of it, holding that, in all cases, where the price is inadequate, the Court will seize upon delay, connect it with inadequacy, and refuse to interfere upon the two grounds together. (2 *Pow. on Cont.* 229. *Sugden's L. of Vend.* 2d *Am. from 5th Lond. ed.* 190.) These authors both think inadequacy alone not sufficient; but otherwise, when connected with lapse of time. Possession being taken does not vary the case. This was holden in *Savage v. Taylor*, (*Cas. Temp. Talb.* 234) cited by the Chancellor. The true principle of this case is contained in the opinion of the Chancellor, and his words, relative to the *taking possession*, need not be accounted for, by supposing



that he had some edition of the work not seen by the gentleman. That it was taken, is evident both from the opinion and the decree. In *Whorwood v. Simpson*, (2 *Vern.* 186) *Alley v. Deschamps*, (13 *Ves.* 225) and *Rochfort v. Creswick*, (2 *Br. P. C.* 296) possessions had also been taken, and, in the two last cases, held a long time ; yet a specific performance was refused.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

*S. Jones*, (same side) entered into a very full examination of the cases cited by the Attorney General, vindicated his views, and enforced and illustrated his arguments. He said the doctrine, as stated by the Lord Chancellor, in *Radcliffe v. Warrington*, (12 *Ves.* 331, 332) that enforcing specific performance is not a matter of course ; that the jurisdiction is not compulsory upon the Court, but the subject of discretion ; that the question is not what the Court might do, but what it may do under the circumstances, runs through all the cases, to the period of our revolution. It is true, that where the matter is peculiarly the subject of Equity jurisdiction, as a legacy, the Chancellor has no more discretion than exists at law ; because, to exercise it might take away all relief : otherwise, if a remedy may be had in either Court. The exercise of discretion is safe, because the party to whom relief is denied may still go to law. If at the revolution this was the law of *England*, we adopted it by our constitution ; and if it has been shewn that subsequent to this period the English Chancellors followed new rules, this Court were not bound to follow them. He said this not to disparage the decisions of the English Courts. Reason on the other side of the Atlantic is the same as here ; but if the English rule has undergone no alteration with us, it is the safest to abide by it. He agreed, that *obiter dicta* of Lord *Eldon* had thrown doubts upon the question, but nothing more. There is no case, even in *England*, deciding directly that inadequacy is an insufficient objection to a specific performance.

In *Mortimer v. Capper*, (1 *Br. Ch. Rep.* 158) a case is cited, and in *P. Wms.* are several cases in which a great change in the value of the property, even after the bargain, was held

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

enough to deny a specific execution. And *Ex parte Minor*, (11 *Ves.* 559) will be found a case in which the same ground was taken, even as to an auction sale.

The principle, that a sot is never in a fit situation to do business, is not only sustained by the authorities, but recognized by the statute, (*sess.* 44, *ch.* 109) giving over the management of his affairs to the town officers.

Cases had been cited, to shew that there can be no exercise of discretion, where the remedy was gone at law; but these were cases in which the remedy is exclusively equitable, like *Attorney General v. Day*, (1 *Ves.* 218, 221) which related to the execution of an order made upon a Master's report; and the party never could have gone to law. On this ground relief was granted. Talking of discretion does not always pre-suppose an existing present remedy at law. There are cases where it will be exercised, though there be no such remedy. In *Hick v. Phillips*, (*Prec. in Ch.* 575) there was none, and yet the Court exercised their discretion in denying a specific performance.

*J. V. Henry*, in reply. I presume it would not have been contended, that the appellant lost all remedy, by default, in not tendering a deed on the 1st of June, and by not then being in a capacity to convey, if there were no inadequacy in the case. As to the impediment arising from the mortgage, I cite *Pow. on Con.* 266-7, where the author says, "It will make no difference, in respect to performance in specie, although it be evident, from the person's own showing who institutes the suit, that he had not, at the time of entering into the agreement respecting which the suit is preferred, a good title to the hereditaments which are the subject of it." He relies on *Longford v. Pitt*, (2 *P. Wms.* 629) where the Master of the Rolls said, "It is enough that the party have title at the time of the decree; which is always the single subject of inquiry on reference." He illustrates his doctrine by the case where an act of parliament was required to make the title perfect.

It is said, there is a distinction between a defect removable by the act of the party, and some other power; that, in

ALBANY,  
April, 1824.Seymour  
v.  
Delaney.

the latter case, he is more favoured. Why so? Is not one more blameable, when he contracts to sell an estate in the power of another, than where it is under his own control exclusively? In *Wynn v. Morgan*, (7 Ves. 202) the general principle is advanced, that time is not material, in the eye of a Court of Equity, and that it is enough that the party seeking performance have a title at the hearing. I admit it is different, where time is of the essence of the contract, as in the case of the South Sea stock agreements. A want of title is certainly more material than a mere lapse of time for a few days; and yet it has been uniformly held, that the former should be relieved against. This was so in *Wynn v. Morgan*, (7 Ves. 202) and in *Mortlock v. Buller*, (10 Ves. 315) and in *Jenkins v. Hiles*, (6 Ves. 646) and in *Davis v. Hone*, (2 Sch. & Lef. 352.) In *Day v. Newman*, (2 Cox, 77) which has been triumphantly cited against us, the Master of the Rolls explicitly declares, (p. 83) that lapse of time is no objection. *Clute v. Robison*, (2 John. Rep. 595, 614) recognizes the same rule. The decree was reversed in that case, upon the express ground that though the party had no title when he first came to perform; yet the objection was obviated at the time of the decree. *Hepburn v. Auld*, (5 Cranch, 262) establishes the same point.

That the appellant is without remedy at law, is a powerful reason in favour of a specific performance. At law, the appellant must have averred performance, or a tender of performance, on the 1st of June. This was a condition precedent. We could not perform at that day; and, therefore, our legal remedy is gone. *Newland on Cont.* 89, says, that Courts of Equity afford assistance, as to land or real estate, principally in those cases where Courts of law are incapable of giving to the party the remedy which he seeks; though, he says, that contracts relating to stocks and personal chattels are an exception. In *Flint v. Brandon*, (8 Ves. 163) the Master of the Rolls says, "It is only where the legal remedy is inadequate or defective, that it becomes necessary for Courts of Equity to interfere." In *Errington v. Aynsley*, (2 Br. Ch. Rep. 341) it is said, (p. 343) "A specific performance is only decreed where the party wants

ALBANY,  
April, 1824.  
Seymour  
v.  
Delancy.

the thing in specie, and cannot have it in any other way." (*Davis v. Hone*, 2 Sch. & Lef. 347, S. P.) *Milford*, in his *Treatise on Pleadings*, p. 95-6, advances the same doctrine.

I have given several cases in which it was held, that because the party was remediless at law, he should, therefore, be relieved in Equity. Other reasons are, that several of the respondents are infants. They are trustees; and, both at common law and by the statute of *Ann*, (1 R. L. 148, s. 7) the remedy is confined to a Court of Equity alone. This contract is one of exchange. The specific thing is in question; and the case is distinguishable, in this respect, from most of those where money was the consideration on one side.

I know not what use gentlemen intended to make of 1 *Mad.* 339, as to what covenants are necessary in a deed. We have never refused to give a deed, including all the covenants contemplated by our contract. These are broader than *Ellison* agreed to enter into on his part. In *Butler v. O'Hear*, (1 *Dess. Rep.* 382) the party could not make out a title at the hearing; and *Judson v. Wass*, (11 *John.* 525) and *Hasbrouck v. Tappen*, (15 *John.* 200) merely shew the strictness which prevails at law. In *Alley v. Deschamps*, (13 *Ves.* 225) there was not only a change of circumstances, but the party had lain by for three years, without any excuse of his default. This was held an abandonment, upon the peculiar facts of the case. *Kien v. Stukely*, (*Gilb. Rep.* 155) confirms our doctrine that, to make lapse of time material, it must be of the essence of the contract. An intention to pay in South Sea stock was frustrated by delay. That this is the sense of the rule appears also from *Lewis v. Ld. Lechmere*, (2 *Eq. Cas. abr.* 20, pl. 17.) Time was there deemed material, because the stock fell. Where is the analogy between that and this case? Here is land of ascertained value. There was stock continually fluctuating in its price. *Lloyd v. Collett*, (4 *Br. Ch. Cas.* 469) is remarked upon in *Newland on Contr.* 242. That author says, if considerable time has elapsed, without sufficient reason to excuse the delay, Courts of Equity now decline decreeing a specific per-

formance, and states *Lloyd v. Collett* as illustrative of the position. There were repeated applications, in that case, to perform, and the contract was held to be abandoned. In *Milward v. Earl Thanet*, (5 Ves. 720, note b.) the parties differed as to the construction of the agreement; and there was a delay of 7 years. That the party must be *ready, desirous, prompt and eager*, as said by that case, is a figurative expression, which means merely that he must not be negligent. Possession was delivered in the present case. There was a part execution. *Colson v. Thompson*, (2 Wheat. 336) was a case of gross neglect, in not effecting a survey. *Hepburn v. Dunlop*, (1 id. 179) says nothing about the lapse of time, but contains the principle, that if the title be good at the decree it is enough. *Sugden*, 190, is, I admit, against us, if the text were to stand by itself; but the cases on which it is bottomed are of contracts where either time was of the essence of the contract, or there was fraud or abuse of confidence. To have been borne out by the cases as to time, he should have qualified his rule, by providing that it should be of the essence of the agreement. 2 *Powell on Contr.* 229, 230, presents a class of cases where the contract should not have been executed, even if there had been no delay. *Rochford v. Creswick*, (2 Br. P. C. 296) was tried by the rule as to fairness and honesty; and in *Harrington v. Wheeler*, (4 Ves. 686,) cited also in *Newland on Contr.* 243 & 244, there was a lapse of 6 years; no act done towards execution, and, in the mean time, the vendor had agreed to convey to a third person. *Benedict v. Lynch*, (1 John. Ch. Rep. 370) is also cited. It will merely be necessary to read the caption of that case to see that it cannot apply. The agreement was declared to be void, in terms, by the parties; and the Chancellor relies upon this express provision. He thinks that the parties may make the time material by express agreement, though it had been formerly held otherwise; and he also relies upon the fact that there was no excuse for the delay. The want of this excuse is included in his general rule laid down at pages 375, 376. That rule is correct. It excepts a case of acquiescence. We are suffered to remain in possession without objection; and fall directly within the quali-

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

fication. He afterwards repeats the same idea ; and the case has no application, until it be shown that *Seymour* has released his claims. So far from this, here was a cotemporaneous delivery of possession by both parties. We say that where the time slips by, being of the essence of the contract, it is never an objection to a specific execution, unless the party, who alone can be injured, promptly refuses to complete the purchase on this ground. *Hick v. Phillips*, (*Proc. in Ch.* 575) was an effort to impose copyhold upon the party instead of freehold. *Hanger v. Eyles*, (21 *Vin.* 540, (*A*) *pl.* 1, 2 *Pow. on Cont.* 230, *S. C.*) was an utter incapacity to convey at the day ; and *Pincke v. Curteis*, (4 *Br. Ch. Rep.* 328, *Newland on Cont.* 231, *S. C.*) was not only an omission at the day, but this was followed by communication between the parties, and there was no effort to procure a performance, and no acquiescence in the delay by the party injured, yet a performance was decreed. *Newland*, (*p.* 246.) states the case of *Guest v. Homfray*, (5 *Ves.* 818) too strongly. The cases stated by him are mostly of auction sales, where time is material ; and the case from 5 *Ves.* 818, admitted delay as an objection, because no title could be made out ; and the vendee, for that reason, declined going on.

On the whole, the cases are not opposed to the doctrine for which we contend. In no case, where time was not of the essence of the contract, has a short delay been holden any objection, especially if imputable to an incumbrance, or want of title, which may be removed. A bill cannot be filed till after the day passes. If delay be a sufficient objection, why all this doctrine in relation to lapse of time ? The party may always file his bill at a short day, as was done in this instance ; and if the incumbrance is removed before the decree, it is enough. *Ellison* is in fault as much as *Seymour*. The former took no step towards a performance of the contract, though he did no act to disaffirm it.

Shall the incumbrance and delay, then, though nothing in themselves, become effectual when added to inadequacy, which is also nothing ? and, when taken together, make a whole, which is to constitute a defence ? It would be like adding and giving effect to a series of cyphers.

Occasional intoxication is no defence, unless it has resulted in a total prostration of the mind. (1 *Pow. on Cont.* 29, 30.)

*Jones.* We do not rely upon occasional intoxication as constituting an objection. Our position is, that habitual intoxication, producing mental debility, disqualifies the party to contract, the same as any other disease of the mind.

*Henry.* *Cook v. Clayworth*, (18 *Ves.* 12) contains the whole doctrine upon this subject; and I shall content myself with referring to that case. The note at page 14 of that book is relied on against us; but when this speaks of intoxication as a disability, it means a state of actual intoxication at the time of the contract. Habitual intoxication, or mental disability from any other cause, is not proved.

These parties, then, stood on a footing of perfect equality, so far as capacity and means of judging were concerned; and is it to be tolerated that mere inadequacy, not sufficient to evince fraud, shall defeat a bill for specific performance? The consequences would be monstrous. A large land holder sells to a farmer at \$1 per acre payable by instalments. The day of paying one of these instalments passes; and the land was in fact worth \$2. Shall the vendor have it in his power to decline a conveyance upon such ground? One wishing to exchange a commercial for an agricultural life, selects his residence, and purchases of the farmer, at \$40 the acre, what was worth but \$20. On becoming sick of his bargain, may he be off? This is a plain case of the *pretium affectionis*; and yet the Chancellor's doctrine allows a place for repentance. This is inadequacy, *per se*. The same rule must be extended to large speculations in cities where the price of the subject falls. The only safe rule is the one for which we contend, that the inadequacy must be such, *per se*, or connected with other circumstances, as shall be proof of fraud; otherwise, what shall be the standard in a country where real estate fluctuates in value as it does here? Allowing the objection, of inadequacy *per se*, makes the Chancellor the arbiter of every bargain.

I propose briefly to examine the cases on this subject, as they arise in chronological order. *Parker v. Palmer*, (1 *Ch.*

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

*Cas. 42).* is not, as supposed by gentlemen, given up. It is not, as supposed, barren of fact. It is a strong case. The execution of a mere bet upon contingency was decreed, though inadequacy was conceded. *Phillips v. Bucks*, (1 *Vern.* 227, 229) lays down a general position which runs through a number of cases; but there had not been fair and open dealing. *Berny v. Pitt*, (2 *Vern.* 14) was an unconscionable bargain with an heir for his expectancy; and in the *Marquis of Normanby v. Berkly*, (5 *Vin.* 539) not a single fact is stated; and the general position taken is, what we admit, that the contract must be fair. It is supposed that a jury might mitigate the damages. So far it is not law; and the whole case is rendered of doubtful authority by such a position. A jury cannot mitigate, unless the contract betrays absolute folly. Even there, the rule prevails in no case except where there is fraud or imbecility. *Green v. Green*, (5 *Vin.* 538, *pl.* 19) was a dealing in relation to a mere expectancy, and yet the Court refused to set it aside. *Young v. Clerk*, (*Prec. in Ch.* 538) illustrates the danger of depending for a guide upon the general rules laid down in cases, without going to the circumstances. We are told, on the authority of this case, that the contract must be free from all exception, by reason of under value. The Lord Chancellor said, that the contract was unreasonable, or founded in fraud, and dismissed the bill, and left the party to law. The facts shew fraud—viz. a concealment of the leases—a palpable *suppressio veri*, one branch of the very definition of fraud. It is not a case of mere inadequacy, though it was relied on as such, and is, undoubtedly, a leading case upon which the doctrine contended for on the other side is founded. In 5 *Vin.* 533, *pl.* 32, will be found a string of cases, from Lord *Harcourt's* manuscript tables, containing the principle that Equity will not carry unreasonable agreements into execution. At page 538, *pl.* 21, a specific execution was denied, because the plaintiff had shuffled, and a distinction was drawn, which runs through all the cases, between stock and land contracts, and the reason is given. The same page, 548, *pl.* 9, says, "Contract for S. S. stock, at an unreasonable price, set aside," referring to



the case of *Thompson v. Harcourt*, (2 Br. P. C. 415.) The result given is inaccurate ; and it shews how little reliance can be placed upon these manuscripts. *Rochfort v. Creswick*, (2 Br. P. C. 296) respects the fairness of the agreement ; one of the qualifications of the rule which we laid down in the opening. *Kien v. Stukely*, (Gilb. Rep. 155) was a contract for lands, at 40 years purchase, which were not worth more than 15. The intention was, to pay in South Sea stock, and a specific execution was denied, on the ground that the time had elapsed, and the stock fallen. That was a case where time was of the essence of the agreement.

Gentlemen persist, that *Thompson v. Harcourt*, (2 Br. P. C. 415) is correctly considered by the Chancellor a mere case of inadequacy. What we say is, that he should not have placed it on the ground of inadequacy alone. The contract, in that case, could not have been executed at the opening of the books, and the vendor could never, therefore, have succeeded at law ; yet the Court say to the purchaser upon a bill for execution, " You shall pay at the rate of 920 per cent. on the £290 ;" and leave the case there. The contract was not only executed, but this was done by the halves. *Powell*, a man of deep learning, in his treatise on contracts, (2d vol. p. 232) says, of this case, that the execution of the contract was decreed by Chancery, on the ground that a subsequent change in value or circumstances could not impair its validity, and that this decree was affirmed in the House of Lords. He does not, therefore, understand it as the Chancellor does. This case was decided in 1722. Now I refer to *Squire v. Baker*, (5 Vin. 549, pl. 12) decided in 1726, only 4 years after, where it is said, " A written agreement being unreasonable, the Court would not carry it into execution, but decreed that it be delivered to the party for whose benefit it was designed, that he may have an opportunity to make the most of it at law." Now, I ask, how does this last consist with *Thompson v. Harcourt* ? Yet the Chancellor cites both cases as supporting the same position. *Savage v. Taylor*, (Cas. Temp. Talb. 234) went upon the unfairness of the party, and the facts will be seen

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

clearly to warrant that ground. Inadequacy is not even mentioned. *Barnardiston v. Lingwood*, (2 Atk. 133) contains the general proposition only, that the bargain being hard is an objection to a specific performance. But the agreement was made while the vendor was in distress, and there was, in fact, misapprehension. The Court say, if the agreement had been fair they would have decreed a conveyance. Accordingly, in *Goring v. Nash*, (3 id. 187, 188) it is said, the discretion which the Court exercises is not arbitrary, but referrible to general rules. *Buxton v. Lister*, (3 id. 386) is relied on against us; but it merely reiterates the general rule, that the agreement should be *certain, fair and just*. This was a case of personal property. In *Joynes v. Statham*, (id. 388) there was circumvention. The same spirit pervades the whole of Lord *Hardwicke's* decisions. See, also, *City of London v. Nash*, (id. 512; 1 Ves. 12, S. C.) where a specific execution was holden oppressive, and an issue directed to ascertain the damages. In *Underwood v. Hitchcox*, (1 Ves. 279) he says, "the rule, that decreeing specific performance is discretionary, is well known; that to warrant this, it should be in writing, fair in all its parts, and for adequate consideration." This case depends particularly upon the policy of the English Courts, who give all possible effect to family settlements. At p. 280, it is treated upon this ground, and said, the estate was intended by the uncle as a benefit to the defendant and his family.

*Faine v. Brown*, cited by counsel in 2 Ves. 304, was a case where, if a stranger had been a purchaser, the vendor would have lost half his estate. To decree a specific performance would have been equivalent to decreeing a penalty. Beside, the vendor was intoxicated at the time. In 1 Fonbl. *Newland and Powell*, this case is not mentioned at all, with reference to the question of inadequacy. If the purchaser had been the brother himself, Lord *Hardwicke* would still have told him he was a volunteer, and not entitled to relief. *Pope v. Roots*, (7 Br. P. C. 184; 1 id. 370, Toml. ed.) is not law. It will be seen, by 2 Pow. on Contr. 76, 62, and Newl. on Con. 82, 3, 4, 5, that it has been overruled in its broad sense, and has resulted in this, that no after inequality can prevent a

specific performance, if the contract was for adequate consideration when made. *Mortimer v. Capper*, (1 Br. Ch. Cas. 156) before cited, proves this rule conclusively. The bargain was fair, and though the inadequacy was great, it was executed. *Heathcote v. Paignon*, (2 Br. Ch. Cas. 175) repeats the doctrine, reviews the last case, and speaks of resting the question of specific performance on the market price, as an absurdity. It takes the difference between the effect of mere inadequacy, and the evidence arising from gross inadequacy. It is said, "Here is no evidence of distress—nothing but inadequacy of value—and if that could be made the rule, the least circumstance which varied the next case which occurred might make the difference;" thus giving the rule for which we contend, in the most luminous manner. The parties stood on equal ground: the contract should have been executed, and it was executed accordingly.

*Day v. Newman*, (2 Cox, 77) is correctly relied upon, as giving force to the objection of simple inadequacy. Lord *Alvanley* and Lord *Rosslyn* are noted, as being the only Chancellors who had recognized this doctrine, or attempted to break in upon the opposite rule. (*Newland on Contr.* 66.) To my mind there was evidence of overreaching in the vendor, and imbecility in the vendee. It was, in fact, a case of constructive fraud, arising from inadequacy and overreaching, though Lord *Alvanley* chooses to deny this, and places the case upon the foundation of simple inadequacy. Yet, in the same year, (1788) a correct view of the subject had been taken by the Court of Exchequer, in *Collier v. Brown*, (1 Cox, 428.) In that case it was insisted, (*id.* p. 431) that inadequacy alone was an objection, but denied by the Court, in so many words, and the rule stated as we contend for it. *Collet v. Wollaston*, (3 Br. Ch. Cas. 228) decided in 1791, was an agreement to assign stock; and by leaving the party to law he would get the value. *Perkins v. Wright*, (3 Harris & M<sup>Henry</sup>, 324) quoted by gentlemen, is plainly not law. It even goes the length of impeaching the contract, from a subsequent accidental change of value; against which the rule is now clearly settled, by cases respecting annuities, destruction by fire, or by

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

ALBANY,  
October, 1824.

Seymour  
v.  
Dalaney.

earthquakes. (*Poole v. Shergold*, 2 Br. Ch. Cas. 118. *Jackson v. Lever*, 3 id. 605.)

*White v. Damon*, (7 Ves. 30) was an auction case. Lord Rosslyn had decreed against a specific performance, on the ground of inadequacy; and Lord Eldon denies his doctrine, going on the ground that it is an auction sale; but the broad proposition which he lays down after this, denies the objection of general inadequacy. *Flint v. Brandon*, (8 Ves. 163) has no application; but in *Emery v. Wase*, (id. 505, 517) Lord Eldon confirms his former doctrine, saying that mere difference of value, though considerable, is no objection. The refusal to decree an execution, in that case, was on the ground that the Court will never compel the husband to exercise his authority over his wife for that purpose. Again: in *Cotes v. Trecothick*, (9 Ves. 246) Lord Eldon says, inadequacy does not depend on one's giving *pretium affectionis*, and to make it available it must be such as shocks the conscience. The *pretium affectionis* does not mean attachment merely, but any peculiar motive which leads to a purchase, even for the sake of selling again. The odious appellation of fraud can never be applied to such speculations. Try the rule by this case. Admitting that *Ellison* purchased with a view to the navy yard, and was disappointed, and allowing that he gave too much, should a specific execution be, therefore, denied? Sir Samuel Romilly, in citing *Tilly v. Peers*, (10 Ves. 301) from his own notes, adds to what is mentioned by the Chancellor, of that case, that on a cross bill it appeared to be a case of clear fraud; and it is on the latter ground that we must take performance to have been denied. *Mortlock v. Buller*, the principal case, beside being one of an auction sale, went on the ground that the agent had no power to sell, and had imposed upon the trustees. There would have been a breach of trust, also, had the trustees conveyed. It is rather to be inferred, that the case cited by Sir Samuel Romilly went on the ground of fraud disclosed in the cross bill, because in *Western v. Russell*, (3 Ves. & Bea. 187, 190, A. D. 1814) he denied that inadequacy is a defence, and says he pressed it in vain in *Mortlock v. Buller*, and it never had been holden sufficient.

ALBANY,  
April, 1824.Seymour  
v.  
Delancy.

I forgot to notice, in the order I had prescribed to myself, the case of *Adams v. Weare*, (1 Br. Ch. Cas. 568) decided in 1784, which was a case of 60 years purchase, upon the faith that the vendee could make the subject worth what he gave, by obtaining certain mill privileges. The inadequacy was plain, but as there was no evidence of fraud or mistake, a specific execution was decreed, and the Chancellor lays down our rule, strongly.

*Mason v. Armitage*, (13 Ves. 25) merely qualifies the rule for which we contend, by admitting a mistake to be a defence. In *Willan v. Willan*, (16 Ves. 83) surprise is mentioned as another qualification; and the Chancellor enters fully into the distinction for which we contend between the force of circumstances which will operate to set aside an agreement, on the one hand, or deny its execution on the other. *Cadman v. Horner*, (18 Ves. 10) gives misrepresentation as another qualification of our rule; and does not touch the question whether inadequacy is a defence, *per se*. In *Buckle v. Mitchell*, (*id.* 111) Sir W. Grant, Master of the Rolls, says, "a contract for a purchase is an equitable title; and the person having such title is, in Equity, to most purposes, considered as the complete owner of the estate. It is true that Equity does not in every case lend its aid to carry a contract for a purchase into execution; but it does not arbitrarily execute one contract and refuse to execute another. Some ground must be laid to prevent the party from obtaining, in this case, the assistance which the Court usually gives in cases of the same general description."

*Western v. Russell*, (3 Ves. & Bea. 187) is a case parallel with the present in all its features. The marginal note is this: "Inadequacy of consideration no ground for resisting the execution of a contract to sell; the vendor not being under any incapacity, deficiency of judgment, or led by accident or design into a misapprehension of the value." Sir Samuel Romilly denies, *arguendo*, that inadequacy is a defence; and Sir W. Grant, Master of the Rolls, says, virtually, that inadequacy of price cannot be urged where every thing is perfectly fair; but that it can be used only as auxiliary to other proof of fraud, incapacity, or the like. These

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

being out of question, he refused to consider inadequacy. The inadequacy there was very great. We come within the precise terms of that case, except that the inadequacy here is not near so striking. The case of *Howell v. George*, (1 *Mad. Ch. Rep.* 1) proceeded on the ground that the interest of the wife and son were to be affected; and the Chancellor would not compel the defendant to control them. Another ground was the intrinsic difficulty upon the words of the power. The rule is laid down there, generally, that the Court will not decree a specific performance where the case is *hard*, &c. But it really goes on the mistake of the party in supposing that he had an estate in fee when it was only for life; and sanctions one qualification of the rule which we advanced in the outset; that of mistake. In 2 *Powell on Cont. ed. of 1790*, p. 228, it is said, "But exorbitancy, uncoupled with circumstances of fraud, has not been determined to be a ground for the Court of Chancery to refuse its interposition on behalf of the vendor of an estate." Not one case can be found except *Day v. Newman*, (2 *Cox*, 77) opposed to this position. *Newland on Contracts*, 65 and 66, treats the point as some what unsettled, and considers several of the authorities, which have been cited in the course of the argument.

The case of *Howorth v. Deem*, (1 *Eden*, 351) cited on the other side, did not involve the question of inadequacy. It related to a family settlement; and *Johnson v. Hill*, (1 *Vern.* 271) was the case of an heir selling his expectancy, which rests on grounds peculiar to itself. *Hick v. Phillips*, (*Prec. in Ch.* 575) was cited as a case of over value; but, plainly, it did not go on that ground, though it is true that *Young v. Clerk* was there cited; but this was to shew that the Court have a discretion to refuse a decree of performance generally. 1 *Mad. Ch. Rep.* 9, n. cites *Faine v. Brown* for the same purpose. *Vaughan v. Thomas*, (1 *Br. Ch. Cas.* 556) was a case of personal property, and *Collet v. Wollaston*, (3 *id.* 228) a case of stock. The 1st edition of *Mad. Chancery* does not, as supposed on the other side, vary substantially from his last, in relation to this subject. The phrase is essentially the same in both editions, because

ALBANY,  
April, 1824.Seymour  
v.  
Delancy.

there was no material change in the principle of the cases upon which that writer relied. *Simmons v. Hill*, (4 *Harris & M'Henry*, 252) goes merely to discretion in refusing to decree a specific performance, without placing it on the ground of inadequacy. *Carberry v. Tannehill*, (1 *Harris & Johnson*, 224) was a case of youth and great ignorance in the vendor. The Chancellor adverts to these grounds particularly; and the same remark applies to *Clitherall v. Ogilvie*, (1 *Dess*, 250.) In addition to ignorance and youth, there was great precipitancy; and the inadequacy was gross, so as to evince fraud. The note to that case (p. 258,) will show that it does not rest upon the objection of mere inadequacy. *Campbell v. Spencer*, (2 *Lin.* 129) is also cited; but it militates against the gentlemen. The right to a specific execution was, in that case, tried by a jury. There was no great inadequacy; nor did *Yeates*, J. who tried the cause, hold the contract to be void. He left it to the jury, who found against the contract. There was evidence from which they might have inferred fraud; and, for this reason, the Court denied a new trial. But they agreed with *Yeates*, J. upon the point of inadequacy. *Franklin v. Osgood*, (2 *John. Ch. Cas.* 1) was an attempt to set aside a sale. The case did not call upon the Chancellor for a discussion as to the effect of inadequacy upon a bill to enforce performance. What he said as to this was, therefore, entirely gratuitous. Both, *Pope v. Roots*, (7 *Bro. P. C.* 184,) and *White v. Nutt*, (1 *P. Wms.* 60) are considered by *Newland* in his treatise on contracts, 85, 86, as shewing that subsequent circumstances of change are no objection, and he gives a variety of instances, farther illustrative of this position; as the death of one on whose life an annuity depended—destruction by fire, &c. in all which specific execution was decreed. What the *Ld. Chancellor* says in *Rose v. Cunynghame*, (11 *Ves.* 554) confirms this idea. The estate is considered as executed in the vendee; and the decree operates as a mere confirmation.

Now why go to the jury? Can they mitigate damages in consequence of a change of value? *Bac. Abr. Damages* (D) to which we are referred for this, cites cases of mere cheat, or extreme folly and weakness. But could the jury divide

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

the loss even if the *Newburgh* lots had been sunk? They have no discretion. They are not arbitrary judges in matters of contract. Could they, in this case, give an amount in damages to the appellant short of the value of the farms, admitting that his remedy at law was good? The measure of the damages is the worth of the thing, on the day when the conveyance was to be made.

Statement of  
case.

**Savage, Ch. J.** On the 14th day of *January*, 1820, *William Seymour* and *Thomas Ellison* entered into an agreement under seal, by which *Ellison* agreed to convey to *Seymour* two farms in the towns of *Montgomery* and *Walkill*, in the county of *Orange*, containing by estimation 799 acres of land; and *Seymour* agreed to convey to *Ellison* an equal undivided third part of certain lots in the village of *Newburgh*; the conveyances to be executed on or before the 1st of *June* then next. It was further agreed that the parties might respectively take possession of the premises so to be conveyed to them. The parties did take possession accordingly; and, on the 3d of *August*, 1820, *Ellison* died without the conveyances being executed. The bill was filed against the respondents, as the heirs of *Thomas Ellison*, to compel the performance of the above contract. It was resisted in the Court of Chancery on three grounds:

Points.

1. Inadequacy of price.
2. Debility of *Ellison's* mind produced by habitual intoxication.
3. The inability of the appellant to fulfill on his part.

The Chancellor dismissed the bill on all these grounds, and expressed an opinion that inadequacy of price may, of itself, and without fraud or other ingredient, be sufficient to authorize the Court to refuse its aid in enforcing the performance of a contract for the sale of land; though it might not be sufficient to set aside the contract.

To be decided.

These are the principal points in the case, on which the defence rests. The testimony is very voluminous, and I shall not now enter into a detailed statement of it. The weight of evidence, in my judgment, establishes the difference in value, between the farms and the lots, at \$3000 and

Difference in  
value \$5000.



upwards; and that *Ellison* was, in the month of *January*, 1820, and before and after, of intemperate habits. Some of the witnesses represented him as incapable of doing business; and others thought him capable, except when intoxicated. It also appears, that, both in *January* and *June*, 1820, the village lots were encumbered by a mortgage to the amount of \$5000, and so continued till shortly before filing the bill.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy:

*Ellison* was of  
intemperate  
habits.

It is asserted by elementary writers that the power of enforcing agreements specifically will not be exercised but to subserve the cause of justice; and that whenever the bargain is a hard one, bordering on oppression; where there has not been perfect fairness; where any facts have been concealed which should have been disclosed; or where any unfair advantage has been taken; in those cases Equity will not decree a specific performance, but leave the party to his remedy at law. (*Reese's Dom. Rel.* 386: *Newland on Contr.* 223-4.)

Elementary  
writers to the  
1st point, &c.

The cases in which a Court of Equity decrees specific performance of contracts, are those where damages recovered at law would not answer the intention of the parties in making the contract. (2 *Sch. & Lef.* 347.)

When equity  
decrees specific  
performance.

In my judgment, his honor the Chancellor is correct in saying that it is not a matter of course, in all cases, to decree specific performance of contracts. (*Cas. Temp. Talb.* 236. 12 *Ves.* 331. 1 *Ves. Jun.* 566.) It requires the exercise of a sound discretion upon a view of all the circumstances. That discretion must, indeed, not be arbitrary and capricious. It must be regulated upon grounds that will make it judicial. (7 *Ves.* 35.) If the contract has been entered into by a competent party, and is, in its nature and circumstances, unobjectionable, it is as much a matter of course to decree specific performance, as it is to give damages at law. (9 *Ves.* 608.)

This is not a  
matter of  
course, but of  
sound discretion.  
But when contract  
is made by  
competent  
party, and is  
unobjectionable,  
it is as much  
of course to  
decree performance,  
as to give  
damages at law.

The appellant's counsel maintain that inadequacy of price, alone, is no ground for refusing to enforce a specific performance, unless it amounts to evidence of fraud. The case of *Thompson v. Harcourt*, (2 *Br. P. C.* 415, *A. D.* 1722) is claimed as an authority by both parties. As I un-

Whether inadequacy  
alone  
be an objection.

Cases cited  
by chancellor.  
*Thompson v.*  
*Harcourt*, (2  
*Br. P. C.* 415)  
*A. D.* 1722.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

derstand it, it supports the proposition advanced by the appellant's counsel. The case was substantially this, so far as it is applicable here : During the insatuation which prevailed on the subject of the *South Sea* scheme, and on the 18th June, 1720, *Thompson* agreed with *Harcourt*, that he would, on the next opening of the books of the company, transfer to him £1000 *South Sea* stock, and *Harcourt* agreed to pay *Thompson* £9,200 for it ; which is 920 per cent. The books were opened on the 5th October. *Thompson* represented to *Harcourt*, that he had the £1000 ready to transfer, (though, in fact, he had but £290.) And *Harcourt* not being prepared to pay the £9200, another agreement was entered into, by which the time was extended to the next transfer day after *Christmas*, upon certain terms. That day was the 1st May, 1721, and *Thompson* not having the stock, procured it of another, to be returned on certain conditions. On that day the stock was tendered to *Harcourt*, but refused by him, and then re-transferred to the person from whom it had been procured for the purpose of the tender. *Thompson* then prosecuted at law upon the contract ; and *Harcourt* filed his bill to be relieved against it. In the mean time the bubble had burst ; and it was enacted by parliament that all contracts for the sale and purchase of the stock, unperformed on the 29th September, 1721, where the seller had not the stock on the day of the contract, or within six days after, should be void as to so much as the seller was not possessed of. *Thompson* then filed a cross bill, praying a specific performance. Both causes were heard at the same time, and the Court decreed that *Harcourt* should pay *Thompson* 920 per cent. for the £290 stock which he actually held of his own. This decree was on the bill for relief ; and the cross bill, which was for specific performance, was dismissed without costs. *Thompson* appealed because he was not allowed the 920 per cent. on the whole £1000 ; but the appeal was dismissed, and the decree affirmed. The only reason why the 920 per cent. was not allowed, on the whole, must have been because he was the owner of stock to £290 only. The decree proceeded upon the act of parliament. So far as the Court acted on the contract, they

must be understood as decreeing a specific performance. In that case there was no pretence of fraud or circumvention. It seemed to rest on inadequacy only ; and that arising from subsequent circumstances ; the stock being worth 920 *per cent.* at the time of the contract. There were other facts and points in the case to which I have not referred, as they have no bearing on the present question.

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

In *Barnardiston v. Lingwood*, (2 *Atk.* 133) *Barnardiston*, being distressed for money, conveyed to *Lingwood*, his (B's) interest, being a remainder in tail after the death of his uncle, worth £300 per annum, for the sum of £300. A bill for relief was filed, and a cross bill for a specific performance, *Ld. Hardwicke* dismissed the cross bill ; and says that in the case of a hard bargain, when it is not absolutely executed, but executory only, the constant rule of the Court is not to carry it into execution.

*Barnardiston*  
*v. Lingwood*,  
(2 *Atk.* 133)  
*A. D.* 1740.

In *Buxton v. Lister*, (3 *Atk.* 383) the bill was to enforce a contract for timber sold at £3050, when it was worth no more than £2500. *Ld. Hardwicke* objected, at first, on the ground that the thing in controversy was a chattel ; but finally decided on the merits ; and dismissed the bill upon the ground of hardship without costs, on *Buxton* giving up the agreement ; saying that if he was to dismiss it upon the misrepresentation (which was fully shewn) he would dismiss it with costs. In the course of his remarks, he uses the language quoted by his honor the Chancellor, " that nothing is better established, than that the Court will not decree a performance of an agreement, unless it is fair and just in all its parts ; and that it is in the discretion of the Court whether they will decree a performance."

*Buxton v. Lis-*  
*ter*, (3 *Atk.*  
383.) *A. D.*  
1746.

In the same year, (1746) the cause of *Joynes v. Statham* came before him, on a bill for a specific performance of an agreement for a lease of a house, which was signed by the defendant only, and contained a stipulation to pay £9 rent, yearly. The defendant insisted, and offered to prove, that the agreement should have been, to pay the rent clear of taxes ; but the plaintiff, who wrote it, omitted that clause. Lord *Hardwicke* admitted the evidence, observing, " that the constant doctrine of this Court is, that it is in their dis-

*Joynes v. Stat-*  
*ham*, (3 *Atk.*  
388) *A. D.*  
1746.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

*City of Lon-  
don v. Nash*, (3  
Atk. 512) A.  
D. 1747.

cretion whether, in such a bill, they will decree a specific performance, or leave the plaintiff to his remedy at law."<sup>21</sup>

In *The City of London v. Nash*, (1 Ves. 12; more fully reported 3 Atk. 512) Lord Hardwicke refused to decree specific performance, on the ground that the Court is not obliged to do this, where it will be attended with great loss and hardship to one of the parties. The bill, in that case, claimed a performance of an agreement to new build certain houses, which the defendant had agreed to do, but, instead of building, had thoroughly repaired them. It is also observed that, even if the defendant intended to evade his contract, still a specific performance would be hard, and all that the city wanted was to be compensated in damages. The Chancellor, therefore, directed an issue.

*Underwood v.  
Hitchcox*, (2  
Ves. 279) A.  
D. 1749.

In *Underwood v. Hitchcox*, (2 Ves. 279) Lord Hardwicke says, the rule of Equity, in carrying agreements into a specific performance, is well known; and the Court is not obliged to decree every agreement entered into, though for valuable consideration in strictness of law, it depending on the circumstances. And, undoubtedly, every agreement, of which there should be a specific performance, ought to be in writing, certain and fair in all its parts, and for adequate consideration. And he refused, in that case, to decree performance, because it was *too hard* to decree the defendant to make a surrender of the copy-hold estate, (which was the thing in controversy) for so inadequate a consideration. He referred to the rule laid down in *Attorney General v. Day*, (1 Ves. 220) where he says that decreeing performance is discretionary, when the party has his election of two remedies, in Equity, or at law; and, even if there is no other remedy, it should not be done, if there are strong and material objections against it. Lord Hardwicke's rule was recognized by Lord Erskine, in *Mason v. Armitage*, (13 Ves. 37.)

*Mason v. Ar-  
mitage*, (13  
Ves. 37) A. D.  
1806.

*Faine v.  
Brown*, (cited  
2 Ves. 307) A.  
D. 1750.

The case of *Faine v. Brown*, cited by counsel in *Ramsden v. Hylton*, (2 Ves. 307) was admitted to be an authority supporting the Chancellor's decree, if it was correctly stated. Lord Hardwicke, in that case, said that, independent of the circumstance of intoxication when the contract was

entered into, the hardship, alone, of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the Court, not to interfere, but leave the parties to law.

In *Day v. Newman*, at the Rolls, (2 Cox, 77) performance was refused, on the ground of inadequacy alone; but in *Collier v. Brown*, (1 Cox, 428) decided the same year, (1788) in the Court of Exchequer, though there was some inadequacy of price, a performance was decreed. An estate, worth £400, or more, was sold for £275. The price first asked was £300; but the owner was not much acquainted with the estate, and supposed she was selling to the tenant, till after the contract was executed. She was, also, very old; yet the Court was of opinion, that the parties bargained with their eyes open, and as there was no imposition or surprise in the case, mere inadequacy of price, (when it could not be used as evidence of fraud) was not, of itself, sufficient to prevent the Court from administering its usual equity.

Three years afterwards, the same Court, in *Tilly v. Peers*, (cited by Sir Samuel Romilly, from his own note, in *Mortlock v. Buller*, 10 Ves. 301) declared, that laying out of consideration all circumstances of fraud, the Court would not enforce a hard bargain. We have not the facts upon which the decision was founded; but it seems, from the remarks of Baron Thompson, that it was a clear case of fraud.

*White v. Damon*, (7 Ves. 30) was the case of property sold at auction, for £1120—worth £2200. A bill was filed for a specific performance; and though Lord Rosstyn first dismissed the bill on the ground of inadequacy, it was not finally decided on that ground. It was before Lord Rosalyn, and afterwards, on a petition for a re-hearing, before Lord Eldon. They both, however, agreed in the general proposition, that it is not a matter of course to carry an agreement into execution, but rests in discretion.

In *Coles v. Trecothick*, (9 Ves. 246) Lord Eldon declared, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive evidence of fraud in the transaction, it is not a sufficient ground

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

*Day v. Newman*, (2 Cox, 77) A. D. 1788, and *Collier v. Brown*, (1 Cox, 428) A. D. 1788.

*Tilly v. Peers*, (cited 10 Ves. 301) A. D. 1791.

*White v. Damon*, (7 Ves. 30) A. D. 1801-2.

*Coles v. Trecothick*, (9 Ves. 246) A. D. 1804.

ALBANY,  
April. 1824.

Seymour  
v.  
Delancy.

for refusing a specific performance. He had just been recapitulating the facts. It was a case of sale of real estate, by an auctioneer, and *Trecothick* had surveyed the premises, and valued them at £23,000—had told the auctioneer not to sell for less than £19,500—and had agreed they should go for £20,000; but he refused compliance with the contract, because another offer of £25,000 had been subsequently made; and if the declaration of his Lordship was made in allusion to those facts, it certainly cannot be questioned.

*Mortlock v.*  
*Buller*, (10  
*Ves.* 292) *A.*  
*D.* 1804.

The case of *Mortlock v. Buller*, (10 *Ves.* 292) was also the case of a sale, by an auctioneer, of an estate for £26,500, worth £34,900. The question of inadequacy was noticed by the counsel, and much discussed. Lord *Eldon* did not decide upon it, but refused the specific performance upon other grounds. He, however, seems to adopt the doctrine of Lord *Alvanley*, that the Court is not bound to execute every contract; that if there was any sort of surprise that made it not fair nor honest to call for an execution, he would not give the extraordinary relief of a specific performance; neither would he order the contract to be delivered up; but would let the purchaser go to law.

*Willan v. Willan*, (16 *Ves.*  
83) *A. D.*  
1809.

So in *Willan v. Willan*, (16 *Ves.* 83) the point of inadequacy was not raised. Lord *Eldon* remarked, that there are many cases where Equity will not disturb an agreement which has been executed, though it would have refused to carry it into execution.

*Western v.*  
*Russell*, (3  
*Ves. & Beames*,  
193) *A. D.*  
1814.

In *Western v. Russell*, (3 *Ves. & Beames*, 193) there was great inadequacy. The purchase was stated by counsel to be at one-tenth of the value. The Master of the Rolls does not, indeed, decide on that point; but he argues strongly against its sufficiency, as a ground to refuse specific performance. There was, in that case, no pretence of incapacity. The vendor set his own price, and obtained it; and though he lived a year and a half afterwards, expressed no dissatisfaction. Yet it was proved that in 1809, when the purchase was made, the estate was worth double the price. The Master of the Rolls, after noticing these facts, remarks, that the Court would treat men's contracts with

great levity, if, on such a state of circumstances, it should refuse to carry them into execution.

In *Griffith v. Spratley*, (2 Br. Ch. Cas. 179, n.) it was decided, that inadequacy alone was not sufficient to set aside a transaction.

Having thus noticed most of the cases cited by his honour the Chancellor, I shall proceed to state some of those cited by the counsel.

In *City of London v. Richmond*, (2 Vern. 423) the bill was filed to compel the performance of a lease. One objection was, that the rent reserved was £700 per annum, and the real value not £300; and that it was against the rules of Equity to decree in specie such a hard and unreasonable bargain. But the Lord Keeper Wright said, as a beneficial bargain will be decreed in Equity; so if it happens to be a losing bargain, for the same reason, it ought to be decreed.

*Adams v. Weare*, (1 Br. Ch. Cas. 567) on appeal from the Rolls, was a bill for the specific performance of an agreement to purchase a mill seat. The purchaser had agreed to give a large price, in the view of building a mill, which depended on the consent of the corporation of Bristol. The contract was absolute in its terms, and the vendor had refused to annex any condition. The vendee could not obtain the consent of the corporation, and refused compliance with his contract. The Master of the Rolls had decreed performance, and Lord Chancellor Thurlow said he thought he had done right; for no case could be cited, where parties have made a bargain with their eyes perfectly open, and no surprise whatever, as in that case, in which the Court had refused to decree a specific performance. - He added, "here is no mistake of the object; and as to the greatness of the price, *Adams*, (the vendor) had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill."

In *Mortimer v. Capper*, (1 Br. Ch. Cas. 156) the question was, whether Equity would enforce the performance of an agreement, for a piece of land, against the heirs of the vendor, where part of the consideration was an annuity of £50, for the vendor's life, and he had died two days after making

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Cases cited by  
counsel for ap-  
pellant.

*City of Lon-  
don v. Rich-  
mond*, (2 Vern.  
423) A. D.  
1701.

*Adams v.  
Weare*, (1 Br.  
Ch. Cas. 567)  
A. D. 1783.

*Mortimer v.  
Capper*, (1 Br.  
Ch. Cas. 156)  
A. D. 1782.

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

the agreement. The whole consideration was £200, and the annuity £50. The ground was worth £1300; and it was contended that the agreement was too hard, and ought not to be carried into execution. The Lord Chancellor said, "I remember a case of a contract for a piece of ground, which was to be enclosed, for £20, and upon a bill for specific performance, the defence was, that it was worth £200; and although the contract was to be performed *in futuro*, yet neither party knowing the value, the Master of the Rolls decreed performance." In relation to the case before him, however, he said, "I think, if *the price be fair*, the contract ought not to be cut down merely because the annuity, which is a contingent payment, never became payable;" and he ordered a reference to a Master, to enquire into the real value of the estate and of the annuity.

Emory v.  
Wase, (8 Ves.  
518, A. D.  
1803.

In *Emory v. Wase*, (8 Ves. 518) the question was, whether a husband should be compelled to procure his wife to execute his contract; and Lord Eldon, *arguendo*, says, "I do not deny that mere difference in value, though considerable, is not, of itself, a sufficient ground for refusing a specific performance of a contract; but very considerable difference in value is not inconsiderable evidence that it was not made with great care and attention."

Burrowes v.  
Lock, (10 Ves.  
470) A. D.  
1805.

In *Burrowes v. Lock*, (10 Ves. 470) *Edward Cartwright* was entitled to £298, and assigned it to the plaintiff, to whom he was indebted £132, and by whom he was pressed for satisfaction of the debt. The costs of the transaction were £10 paid by the plaintiff; and *Cartwright* had previously conveyed away one tenth, so that £142 were given for what was worth £260. The Master of the Rolls decreed performance, saying, "If fraud is out of the case, I do not know that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price."

Cadman v.  
Horner, (18  
Ves. 10) A. D.  
1810.

In *Cadman v. Horner*, (18 Ves. 10) the plaintiff prayed a specific performance of a contract; which was resisted on the ground of inadequacy and misrepresentation; and on those two grounds it was denied. But the Master of the Rolls expressed no opinion upon the question of inadequacy alone.



The case of *Poole v. Shergold*, (2 Br. C. Cas. 118) decides that the difference arising from the calamities of the times ought not to rescind a contract; and *Jackson v. Lever*, (3 Br. Ch. Cas. 605) that a contract for the sale of land, for an annuity for the life of the vendor, shall be performed by the vendor's heirs, though he died without receiving any part of it.

The object of the two last cases, I presume, was to shew that, although the navy yard was not established at *Newburgh*, and although *Ellison* died before the application to enforce the contract, yet neither of these circumstances can constitute a defence to the present action.

Many cases have also been cited by the counsel for the respondents, some of which I shall examine. I will first, however, consider a little further some of the above cases.

ALBANY,  
April, 1824.  
Seymour  
v.  
Delancy.

Some of the  
above cases  
further exam-  
ined.

The case of *Thompson v. Harcourt*, I have considered an authority for the appellant. As I before remarked, it was claimed by the counsel on both sides. It was considered by the Chancellor as a case in favour of the respondents. Perhaps, therefore, I am mistaken in my reading of it, but I think not. It was in the House of Lords. The Reporter has not given the opinion of the Judges, and we must infer the ground of decision from the case, the decree, and the points argued by counsel. The case was decided 13th Feb. 1722.

*Thompson v. Harcourt* (supra) an authority for the appellant.

Decided Feb. 13, 1722.

On the 9th November, in the same year, the case of *Kien v. Stukely* was decided, (which I shall hereafter refer to on another point,) in which a specific performance was refused. Both these cases grew out of the *South Sea* speculation, or were connected with it. In the first, where 920 per cent. was decreed to be paid, it appeared that when the contract was made, it was fair and equal; that stock, at one time was 1000 per cent. above par. The inadequacy arose, therefore, from subsequent circumstances, and did not exist at the time of the contract. In the latter case, lands were sold for 40 years purchase, which, at the time, were worth only 15 years purchase; and the vendee expected to pay in *South Sea* stock. The inadequacy here existed at the time of the contract; and must have been one ground, at

*Kien v. Stukely* (post) Nov. 9 A. D. 1722. Both cases of *South Sea* speculation, &c.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

London v.  
Richmond (supra.)

Adams v.  
Weare (supra.)

In the case under consideration, inadequacy existed, at time of contract.

Cases cited by counsel for respondents

Executor of  
Hill v. Nott, (1  
Vern. 271-2)  
A. D. 1684.

Vaughan v.  
Thomas, (1 Br.  
Ch. Cas. 556)  
A. D. 1783.

least, of the decree. Both cases were decided by the same Court, and within nine months of each other; and, in my opinion, are perfectly reconcilable upon the relative difference of time at which the inadequacy arose. So in *London v. Richmond*, the rent was agreed upon, on a calculation of the quantity of water which certain pipes would discharge. This was greatly overrated; yet the Court compelled performance. The lessee should have calculated better; though, I confess, I am not satisfied with that case.

In *Adams v. Weare* the seller was explicit, and when the purchaser said he would give the price, if the consent of the city of *Bristol* could be obtained, the seller told him, "Sir, I will have no *if* in the case. You must purchase absolutely or not at all." In that case, it was admitted, that the inadequacy existed at the time of the contract, and was known to both parties; and the Court would not permit the purchaser, afterwards, to be off from his contract, because he did not succeed in his speculation.

Not so in this case. The appellant avers that the lots were worth the consideration given, or very near it, long before any thing was ever said about a navy yard at *Newburgh*; and on the other hand, the inadequacy is shewn to have existed at the time of the contract, and not to have arisen from subsequent circumstances. It does not appear that the expectation of a navy yard was the sole inducement to the purchase. It is stated, by one witness, that *Ellison* intended to build stores, and sloops, and go extensively into commerce.

*Johnson, ex'r. of Hill, v. Nott*, (1 *Vern.* 271-2.) In this case, *Hill* bought of the defendant a contingent estate, at an under value. *Nott* had previously brought his bill, to be relieved, and was relieved by Lord *Nottingham*; but, upon a rehearing, before Lord Keeper *Guilford*, that decree was reversed. *Johnson* then brought his bill for a specific performance; and the Lord Keeper said that a contract which carries an equity to have it decreed in specie, ought to be without all objection.

In *Vaughan v. Thomas*, (1 *Br. Ch. Cas.* 556) the plaintiff agreed with the defendant for an annuity worth 9 years purchase, for the consideration of 5 years purchase, and brought

his bill to compel a specific performance ; but the Court said that if they assisted the plaintiff, they should give sanction to a very unconscientious bargain, and that, under this view of the case, he was by no means entitled to their aid.

In *Collett v. Wollaston*, (3 Br. Ch. Cas. 228) the plaintiff had purchased, at auction, the reversionary interest of £2000 *South Sea* stock, subject to the life of a man 45 years of age, and £1200 *South Sea* annuities, for £215 ; and filed his bill for an assignment and transfer. The Master of the Rolls said, the reversionary interests seeming to be sold for a very low price, he would direct an inquiry into their value, before he decreed a specific performance of the purchase. (*Vid. also, several cases, 5 Vin. 539 to 549, adhering to the rule in Normanby v. Beckley, that the contract must be fair and reasonable in every particular.*)

In *Clitherall v. Ogilvie*, (1 Dess. 257—63) the defendant entered into a written contract to sell the plaintiff certain lands, for £3500, which were worth three times that amount. On further inquiry as to the value of the property, he declined executing the conveyances ; and the bill was brought for a specific performance. The Court, after a full discussion and examination of the cases on the subject, took notice of the distinction between setting aside an unreasonable contract, after it is executed, and compelling a specific performance ; and, recognizing Lord Hardwicke's rule in *Underwood v. Hitchcox*, declared, that on full consideration of the case, and all the circumstances, (although there was no proof of fraud or imposition) the sum for which the land was agreed to be sold was grossly inadequate to its real value ; and that, being an unreasonable contract, and a very hard bargain, it would be unreasonable and unjustifiable to decree a specific performance ; and left the plaintiff to his remedy at law.

In *Ward v. Webber*, (1 Wash. Rep. 279) President Pendleton, delivering the opinion of the Court, says, "It is true that the Court will never decree iniquity ; and there are instances where they have refused to decree hard bargains, though fair ; but these are rare, and are generally cases of glaring hardships. For, in general, the Court will not

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Collett  
v.  
Wollaston, (3  
Br. Ch. Cas.  
228) A. D.  
1791.

Several cases in 5 Vin. 539 to 549, supporting *Marquis of Normanby v. Beckley*, (*supra.*)  
*Clitherall v. Ogilvie*, (1 Dess. 257) A. D. 1792.

*Ward v. Webber*, (1 Wash. Rep. 279) A. D. 1794.

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

undertake to estimate the speculations of parties in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations."

In the case of *Campbell v. Spencer*, (2 Bin. 133) there was no fraud or imposition; nor does it appear that there was inadequacy to any great degree; but it was a foolish bargain, whereby a farmer agreed to sell his farm for the remnant of a store of goods; and Chief Justice *Tilghman* and Judge *Breckenridge* both say, they would not enforce the contract, nor declare it void, but leave the plaintiff to his action upon it. Judge *Breckenridge* placed reliance upon its being a hard bargain, attended with suspicious circumstances.

*Osgood v. Franklin*, (2 John. Ch. Rep. 23) A. D. 1816.

In the case of *Osgood v. Franklin*, (2 John. Ch. Rep. 23) the Chancellor remarks, "there is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amount to fraud) yet it may be sufficient for the Court to refuse to enforce performance. It is not uncommon for the Court to refuse to enforce for inadequacy, and at the same time to refuse to rescind."

Note to *Clitherall v. Ogilvie*, (supra) by Chancellor *Dessaussure*.

Chancellor *Dessaussure*, who was not on the bench when the cause of *Clitherall v. Ogilvie* was decided, has added a valuable and learned note to the report of that case, which he concludes by observing, "It is agreed, on all hands, that the Court is not bound to decree a specific performance in every case where it will not set aside the contract, nor bound to set aside every contract of which it will not decree the specific performance. The Court will not decree specific performance, where there is any surprise, making it not fair and honest to proceed and call for specific performance."

The question is one upon which great men have differed.

One class maintain that simple inade-

Having thus taken a cursory view of some of the principal cases on the point under consideration, and having also noticed the *dicta* of some learned jurists, I shall be justified in the remark, that the question is one upon which very great men have differed, and have administered the equity of the

Court upon diametrically opposite principles. The one class maintain, that the Court will not lend its aid to enforce the performance of contracts, unless they are fair, just and reasonable, and founded on adequate consideration. The other class maintain, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance.

The most distinguished of those who support the latter doctrine is Lord Eldon. To him may be added Sir William Grant, Lord Keeper Wright, and probably some others. The former doctrine was declared or acted upon by the Lords Somers, Macclesfield, Northington, Guilford, Talbot, Harcourt, Hardwicke, Alvanley, Erskine, Rosslyn, and Chief Baron Eyre, in England; and in this country it has been adopted by the Court of Chancery of South Carolina, the Court of Appeals of Virginia, and the Court of Chancery of this state; and I believe there is no American decision to the contrary. Among American jurists, of distinguished celebrity, who have maintained this doctrine, are Chancellor Desaussure, of South Carolina, President Pendleton, of Virginia, the late Chief Justice Reeve, of Connecticut, and last, though not least, the late Chancellor Kent, *justum et tenacem propositi virum*; a man whose stern integrity, superior talents, and extensive erudition, have rendered him an ornament to the Courts over which he has presided in his native state; and who may, without arrogance, but with the most perfect complacency, look back upon his 26 years of judicial labours, and say—

*Exegi monumentum ære perennius;  
Regalique situ pyramidum altius:  
Non omnis moriar; nullaque piars mei  
Vivabit libitinam.*

If we determine this question by the prevailing practice of Courts of Equity, (it has not, indeed, been uniform) we must decide in favour of the rule as laid down by Lord Hardwicke. If we determine it by the reason and propriety of the two propositions, there is certainly great weight in the consideration that, in enforcing contracts, the Court, if it

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

quacy is a defence: the other that it must be so gross as to prove fraud. Chancellors, &c. who supported these opposite rules in England.

In this country.

The weight of authority is in favour of the first; and so if it be considered upon principle.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

acts at all, must act *ex rigore*, and cannot weigh the equities of the parties; whereas a jury, in a Court of law, can mitigate the damages according to equity and good conscience. It seems, indeed, paradoxical, to send parties from a Court of Equity to a Court of law, to obtain equity; but it arises from the peculiar construction and practice of the Courts.

Again, if we call to our aid the opinions of men among the most celebrated for their learning and talents, of the times in which they respectively lived, we find a great preponderance in favour of sending hard and inequitable bargains to a Court of law.

Equity should  
should not de-  
cree perform-  
ance, unless  
contract be  
fair, just, rea-  
sonable and  
equal.

It is well  
settled that  
inadequacy  
alone is not  
ground to set  
aside contract.  
There is a wide  
difference be-  
tween enforcing  
and setting  
aside.

2d point;  
Debility from  
intoxication.  
Evidence.

Upon authority therefore, as well as upon principle, I am clearly of opinion, that a Court of Equity ought not to lend its aid in enforcing an executory contract unless it is fair, just, reasonable and equal in all its parts, and founded upon adequate consideration.

It is undoubtedly well settled that inadequacy of price, alone, is not a sufficient reason for setting aside a contract executed, unless its grossness amount to fraud; but there is a wide difference between enforcing an executory contract, and setting aside a contract deliberately executed; and the two subjects admit of very different views and considerations.

The next ground of defence is, that *Ellison's* mind was debilitated by habitual intoxication. The witnesses agree as to the fact of his habitual intemperance, for some years before his death; but they differ in their opinions as to the effect produced by it upon his capacity to transact business. The fact is before the Court; and our acquaintance with mankind supersedes the necessity of evidence to prove that habitual inebriety, in most cases, debilitates the mind. As like causes produce like effects, it would require strong proof to shew that *Ellison* was an exception to the general rule. It also appears that this contract was unknown to his family and friends. It was made by *Drake Seymour*, on behalf of his brother. And though the character of *Drake Seymour* rebuts the idea of fraud or imposition upon a man under intoxication; yet it is well known that interest has a controll-

ing influence over the minds of many, perhaps of most men, even of correct principles; and may, and often does, induce them to make bargains which conscience cannot approve.

The third ground of defence is, that the appellant was unable on the day appointed, to give a title to the lots, on account of incumbrances.

The appellant's counsel contend, that it is sufficient, if he was able to give a title at the time of the decree; and so it was decided by the Master of the Rolls, in *Langford v. Pitt*, (2 P. Wms. 630.) He said that the direction of the Court, in all cases, was, to enquire whether the seller *can*, not whether he *could* make a title at the time of executing the agreement. In *Wynn v. Morgan*, (7 Ves. 202) it was decided that where the time, at which the contract was to be executed, is not material, and there is no unreasonable delay, the vendor, though not having a good title at the time the contract was to be executed nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance.

In *Brashier v. Gratz*, (6 Wheat. 528) Chief Justice Marshall says, the rule, that time is not of the essence of a contract, has been recognized in Courts of Equity; that a failure to perform on the day does not deprive a purchaser of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. But the rule is not universal. Circumstances may have changed; and the other party may be placed in a worse condition; and then the Court would leave the parties to their remedy at law. The party who is ready, may file his bill requiring the other to perform or rescind; and the Court will compel him to do one or the other. If, then, a bill for a specific performance be brought by a party who is himself in fault, the Court will consider all the circumstances of the case, and decree according to those circumstances.

In *Hepburn v. Auld*, (5 Cranch 262) the same point had been so ruled; though Mr. Justice Livingston expressed his dissent, on the point of dispensing with time. (1 Wheat.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Cases on 3d  
point.

*Langford v.*  
*Pitt*, (2 P.  
*Wms* 630,) A.  
D. 1731.

*Wynn v.*  
*Morgan*, (7  
*Ves*. 202,) A.  
D. 1802.

*Brashier v.*  
*Gratz*, (6  
*Wheat*. 528,) A.  
D. 1821.

*Hepburn v.*  
*Auld*, (5  
*Cranch*, 262,) A.  
D. 1809.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

In *Butler v. O'Hear*, (1 *Dess.* 398) the Court say, lapse of time, unattended with other circumstances, is not, of itself, a sufficient ground for it to refuse its aid to compel a specific performance of an agreement; that it was sufficient if the plaintiff could then make title.

Judson v.  
Wass, (11  
John. 525,) A.  
D. 1814.

In *Judson v. Wass*, (11 *John. Rep.* 525) which was a case of the sale of land, at auction, one of the conditions being that the money should be paid in 75 hours, the conveyance to be dated on the day of sale; the premises were encumbered with a mortgage; and the Court said that in every sale of that kind, there is a condition, that the purchaser shall not be bound to part with his money, unless the seller is able to give him a title according to the terms of the sale. That, however, was an action at law, and is not applicable here.

Waters v.  
Travis, (9  
John. 466,) A.  
D. 1812.

In *Waters v. Travis*, (9 *John. Rep.* 466) the late Chief Justice *Spencer*, who gave the opinion of this Court, says, the lapse of time, when no material inconvenience has been suffered, can be urged only on the ground that it is evidence of abandonment of the agreement.

Incapacity  
to give title  
June 1st, 1820,  
not, *per se*, an  
objection.

In the case now under consideration, I am inclined to the opinion, that the appellant not being in a condition to give a good title on the 1st of June, 1820, is, of itself, no objection to a specific performance. The conveyances were to be simultaneous acts; or rather, by the terms of the contract, *Ellison* was first to convey. The language of *Seymour's* covenant is, "In consideration of which premises (the conveyance by *Ellison*) the said *William Seymour* doth by these presents covenant and agree, &c."

Otherwise.  
when connected  
with inadequacy of con-  
sideration.

Kien v.  
Stukely, (2 Br.  
P. C. 396-8,) A.  
D. 1722.

But it seems, that when there is great inadequacy of consideration, the vendor is held to great strictness, as to time, in the performance on his part. In the case of *Kien v. Stukely*, (2 *Br. P. C.* 396-8,) *Stukely*, on the 20th July, 1720, sold lands by contract to *Kien* for 40 years purchase, when they were worth only 15 years purchase, and £120 were paid; *Kien* intending to pay the residue in *South Sea* stock, which was then worth 1000 *per cent.*; and the title was to be made out on the 29th Dec. then next. The title was not made out by the day, and *Kien* declined the purchase. On a bill filed by *Stukely*, performance was decreed;



but on appeal to the House of Lords, this decree was reversed. By the report in *Brown*, the decree seems to rest on the ground of inadequacy ; and the point relating to time is not stated ; but from a report of the same case by Baron *Gilbert*, (*Gilb. Rep.* 155-6) it seems to have been decided on the ground of the vendor not having made out his title to the premises sold by the day stipulated in the contract. The decision is understood by *Sugden* in his treatise on vendors, *p.* 281, as having been made upon both grounds, and he has deduced from it this principle ; that when the price is unreasonable or inadequate, or the contract is in other respects inequitable, Equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

*Gilb. Rep.*  
155-6, S. C.

*Sugden's L.*  
V. 281, S. C.

On the whole case, therefore, I am of opinion :

1. That on the question of decreeing specific performance of executory contracts, the Court of Chancery must exercise its discretion ; not an arbitrary, but a sound judicial discretion. If the contract be free from objection, it is the duty of the Court to decree performance. But if there are circumstances of unfairness, though not amounting to fraud or oppression, or if the inadequacy of consideration be so great as to render the bargain hard and unconscionable ; on either ground the Court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a Court of law.

If it is asked what degree of inadequacy is necessary to constitute the bargain a hard one ; it might be asked, in answer, what degree of inadequacy is necessary to constitute fraud—to shock the conscience, and produce an exclamation ?

The truth is, that neither the one nor the other admits of a definite answer. It must be determined by the judgment of the Court ; and as there is certainly a difficulty in ascertaining the precise point, there is much less danger in stopping short of it, than in going beyond it. To me it seems a solecism in language, to say that a party, who has obtained

Recapitulation.

1. On question of decreeing performance, chancery must exercise a sound judicial discretion.

If contract be free from objection, performance should be decreed.

But if unfairness, not amounting to fraud or oppression, or such inadequacy as to render bargain hard and unconscionable ; on either ground, court may leave parties to law.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Evidence of  
incapacity  
from intoxica-  
tion; though  
not full, is e-  
nough to raise  
doubt.

Lapse of time  
connected with  
inadequacy,  
justifies court  
in refusing  
performance.

Decree should,  
therefore, be  
affirmed.

an *inequitable* bargain, shall be received, in a Court of *Equity*, to demand its performance.

2. In the next place, though the incompetency of *Ellison* arising from habitual intemperance, is not clearly established; yet enough appears to raise a doubt on the subject, and to cast a suspicion upon the fairness of the transaction. The authorities cited, on the question of *selling aside* contracts obtained from persons while under the influence of intoxication, are not applicable. None of them state that a contract so obtained ought to be *enforced* in Equity, by decreeing a specific execution.

3. And, although, lapse of time when not of the essence of a contract, or an incapacity to make title on the day stipulated, are not insuperable obstacles in the way of obtaining the specific execution of a contract, provided title can be made before the decree; yet, when connected with inadequacy of price, they will justify the Court in withholding the exercise of its extraordinary powers in compelling a specific performance.

I concur, therefore, with his honour the Chancellor, and am of opinion that his decree should be affirmed.

WOODWORTH, J. not having heard the argument, gave no opinion.

CLARK, EARLL, GARDINER, GREEN, MALLORY, M'CALL, MORGAN, WARD and WRIGHT, Senators, concurred in the opinion of the Chief Justice.

SUDAM, Senator. In this case, it cannot be necessary for me to enter into a detailed statement of the facts. I shall merely take a general view of the claims of the appellant, and of the defence set up by the respondents, and then proceed to the consideration of the questions submitted to the Court by the counsel who have so ably and ingeniously argued this cause.

Statement of  
the case.

Agreement.

*William Seymour*, the appellant, and *Thomas Ellison*, the father of the respondents, on the 14th of January, 1820, entered into an agreement for the exchange of one third of certain lots owned by *Seymour*, in the village of *Newburgh*,

for certain farms, owned by *Ellison*, in *Montgomery* and *Walkill*. The property is particularly described in the article between them. By this agreement, *Ellison* covenanted with *Seymour*, that he would on or before the 1st day of June next ensuing its date, by sufficient conveyances, grant, bargain and sell, &c. the farms to the appellant, in fee simple ; in consideration of which, *Seymour* covenanted and agreed, that he would, on or before the 1st day of June ensuing the date, sufficiently grant, bargain and sell to *Ellison*, the equal undivided third parts of the *Newburgh* lots, with the wharves, buildings, &c. The articles of agreement contain the following clause: " And it is hereby further agreed by and between the said parties, that it shall be lawful for them respectively to enter into and upon the said premises to them respectively intended to be granted and conveyed, and to have and receive the profits thereof to their own use respectively."

The bill states that, in pursuance of this agreement, *Seymour* entered into possession of, and received the rents and profits of the property to be conveyed to him by *Ellison*, and *Ellison* entered into the possession of the property to be conveyed to him by *Seymour* ; and that *Ellison's* heirs at law have, since his death, continued in possession ; that *Seymour*, during the life time of *Ellison*, was always ready to convey to him, according to his contract, but that *Ellison*, for several months previous to his death, was incapable of transacting business ; and that he died about the 3d of August, 1820, intestate, leaving *Harriet Ellison*, his widow, and the respondents, his heirs at law ; that all his children, except *Mary Jane De Lancy*, are infants, under the age of 21 years ; and that, by reason of their infancy, they cannot convey, according to the terms of the contract ; that Mrs. *Ellison*, (the widow of *Thomas Ellison*) died before the time of filing the bill.

The prayer of the appellant is, that the respondents may be decreed to execute a deed, according to the true intent and meaning of the covenant entered into between the appellant and *Thomas Ellison*, in his life time.

The respondents admit, 1. That their father, *Thomas Ellison*, entered into the covenant with *Seymour*, the appel-

ALBANY,  
April, 1824.

*Seymour*  
v.  
*Delancy*.

Parties to take  
possession.

What the bill  
states.

Prayer of the  
bill.

Answer.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

lant ; but they leave him to prove whether he had a sufficient title to the property to be conveyed by him : 2. They insist, that he had previously conveyed a portion of it to his sister, *Esther Seymour*, or to some other person, for her use or benefit : 3. That his title was very questionable : 4. That the bargain for the exchange was unconscionable, inasmuch as the lands to be conveyed by *Ellison* to *Seymour* exceeded the value of the lands to be conveyed by *Seymour* to *Ellison*, by several thousand dollars : 5. That the appellant could not make a good title to the premises, because they were encumbered by a mortgage remaining uncanceled at the death of *Ellison* : 6. That the appellant did not, on or before, or subsequent to the day specified, tender a deed, in pursuance of the article : 7. That *Ellison*, from the 14th January, 1820, until the 1st June, 1820, "was, in all respects, as capable and competent to transact business, as he was for several weeks and months previous to the 14th of January, 1820." Then the respondents, after stating their age, and denying that the appellant was ready and willing to execute and deliver a deed to *Ellison* in his life time, and leaving him to his proof, submit themselves to the decree of the Court.

Decree.

In the decree entered in this cause, by his honour the Chancellor, he refuses to direct a specific performance of the contract by the heirs at law of *Ellison*, "from the great inadequacy in value of the lots in the village of *Newburgh*, which *Seymour* contracted to convey to *Ellison*, for the two farms in *Orange* county, which *Ellison* contracted to convey to *Seymour*, as mentioned in the pleadings and proofs ; and, also, from the habits of intoxication in which *Ellison* had indulged in the last years of his life, and the mental debility produced thereby ; and, also, from the want of readiness and ability in *Seymour* to convey a good and unencumbered title to the said lots in the village of *Newburgh*, at the time fixed for the performance of said contract, or at any time thereafter, during the life time of *Ellison*."

Points taken  
by respondents  
in its support.

The respondents, in support of this decree, make the following points :

1. That the bargain was *hard, disproportionate and unequal in its terms.*

2. That during the time of the negotiation, and at the time *Ellison* entered into the contract, he was not in a fit state of mind to form such an agreement, or to understand his rights or appreciate his interests; and that the bargain was *secretly and unfairly* obtained by the appellant.

3. That the appellant did not, and could not perform the agreement on his part as stipulated by him, in the life time of *Ellison*, because the appellant's lands were incumbered to their value; and there was no waiver of time, or indulgence given, by *Ellison* in his life time, nor by the respondents since his decease.

The first point made by the respondents, that this contract for exchange of lands was *hard, disproportionate and unequal in its terms*, is the main point in the cause, and has been so treated by the Chancellor in his opinion. He assumes it as a fact, that "at the date of the agreement, the village lots were not worth half the value of the country farms;" and says, "we may make an ample advance of the one, and an ample diminution of the other, in value, if we were to fix the *one third* of the *Newburgh* lots at \$6,000, and the farms at \$12,000."

The decision, upon the evidence given as to the difference in value between the property to be conveyed by the appellant to the father of the respondents, may decide the cause, without entering into the consideration of the other points; but I think our decision must depend mainly on other evidence; for it cannot be sustained, in my opinion, that *mere inequality* in value, which is not so gross as to strike the moral feeling of an indifferent man, would be sufficient to warrant the Chancellor in withholding a decree for specific performance. I admit that the exercise of the power, in a Court of Chancery, to enforce the specific performance of contracts for the sale or the exchange of land, rests in the sound discretion of the Court; but this is a sound legal discretion; and not the exercise of an arbitrary power, interfering with the contracts of individuals, and sporting with their vested rights. I also admit, that the party claiming the spe-

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

1st point—contract hard disproportionate, and unequal—considered.

Inadequacy of at least 1-2 was assumed by the chancellor.

Mere inequality in value, not so gross as to strike the moral feeling of an indifferent man, is not a sufficient defence to a bill for specific performance.

The decreeing performance rests in the sound discretion of the court of chancery, but this

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

is a sound legal  
discretion.

The party  
claiming per-  
formance must  
present a case  
fair, just, and  
reasonable.

The contract  
must be for ad-  
equate consid-  
eration ;

And must be  
free from  
fraud, misrep-  
resentation,  
deceit, or sur-  
prise.

Evidence as  
to these heads.

cific performance must present a case *fair, just and reason-  
able* ; that the contract must be founded on *adequate consid-  
eration* ; and that it must be free from *fraud, misrepresenta-  
tion, deceit, or surprise*.

To determine whether, in fact, the agreement for exchange  
was hard, unequal, and disproportionate, and whether it was  
free from *fraud, surprise, &c.* it will be necessary to exam-  
ine, with as much brevity as possible, the history of this  
transaction.

On the 3d of January, 1818, *Drake Seymour*, the brother  
of the appellant, sold to *Ellison*, the father of the respon-  
dents, the one equal undivided third part of the lot first des-  
cribed in the articles of agreement, lying on the east side of  
*Water-street*, for the sum of \$12,500, cash. This bargain  
was made verbally, in the year 1817, and completed, by the  
delivery of the deed, in January, 1818 ; and the negotiation  
concerning it was kept up from April, 1817, to January,  
1818, when it was consummated. In March, 1818, *Ellison*  
agreed to purchase of *Samuel Sands Seymour*, his undivided  
third part in the same lots, lying east and west of *Water-  
street*, for \$13,825, he taking, in part payment, a mortgage  
which *Ellison* held against one *Tallman*, and *Ellison* agree-  
ing to guaranty, that, on foreclosure, the mortgaged premises  
should produce the principal and interest due. This con-  
tract was signed and sealed by the parties.

In March, 1818, *Ellison* informed *Drake Seymour*, "that  
he had only to purchase the part of the lot belonging to the  
appellant, to own the whole," and made propositions to the  
witness, (*Drake Seymour*) to be submitted to his brother.  
Both in the years 1818 and 1819, *Drake Seymour* frequently  
saw *Ellison* in relation to the purchase of the appellant's  
one-third of the lots ; and from the time *Ellison* first propo-  
sed to purchase from the appellant, to the time when a  
verbal contract was concluded for the exchange, more than  
18 months had elapsed ; and about 1 year and 10 months had  
elapsed before it was reduced to writing and signed by *El-  
lison* and the appellant. On the conclusion of the verbal  
agreement, *Ellison* authorized the appellant to take possession  
of the farms, and possession was taken accordingly. In

ALBANY,  
April, 1824.  
Seymour  
v.  
Delancy.

January, 1820, the appellant sent by *Drake Seymour*, to *Ellison*, at *New-York*, the articles of agreement in question, already executed on his part. They were handed to *Ellison*, to be executed by him. He requested that they might be left with him for examination, to see if they were in conformity with the verbal agreement. He examined them, found them correct, and executed them the day after.

By the evidence of *Samuel McCoun*, who was employed by *Ellison* to estimate the value of the farms, it distinctly appears, that he understood from *Ellison*, that he and the appellant were negotiating for the exchange. In various conversations, he told *McCoun* "that he was negotiating an exchange with the appellant, and that he wished *McCoun* to make up his mind upon the value of the two farms, (to be exchanged for the *Newburgh* lots.) That he, (*Ellison*) did not wish *McCoun* to appraise the appellant's lots in the village of *Newburgh*; but that he would do that himself." It is also in evidence that *Ellison*, during the summer, resided in *New-Windsor*, in the county of *Orange*, adjoining the village of *Newburgh*, and that he was well acquainted with the property of the appellant, proposed to be exchanged for his two farms. It also appears that *Ellison* had a favourable opinion of *Newburgh*, as a business place; and he may have been influenced by the consideration, that property there would rise in value, in consequence of the expected establishment of a navy yard.

That the contract was deliberately made, there can be doubt. *McCoun* says, expressly, that *Ellison* told him "he would not conclude the bargain between him and the appellant, until he had seen him," (*McCoun*), and ascertained his opinion of the value of the farms.

Contract made  
deliberately.

We here find a purchase by *Ellison* in *January*, 1818, of one third of the *Newburgh* lots east of *Water-street*, for the sum of \$12,500, on a negotiation commenced in *April* preceding, and at a time when, according to the pleadings and proofs, there is no pretence of incompetency. About *March*, 1818, *Ellison* purchased from *S. S. Seymour*, his undivided third in the *Newburgh* lots, lying east and west of *Water-street*, for the sum of \$13,825. About the same time, he

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

informed *Drake Seymour*, that he had purchased one third of *S. S. Seymour*, and talked of exchanging the farms for the like share of the appellant. In addition, he informed *Benjamin Case* and *John Anderson*, that he had purchased the shares of *Drake & S. S. Seymour*; and that he also intended to purchase the share of the appellant; and he told *Anderson* how he intended to render the property valuable to himself.

The whole presents a very strong case, and one in which the contract should be carried into effect, unless some controlling rule of decision in our Equity Courts shall require the contrary.

*Ellison* knew  
all the facts.

There can be no doubt, from a review of the evidence, that *Ellison* made his bargain, well knowing all the facts, in relation to the *Newburgh lots*, as well as his farms proposed to be exchanged for them. His own agent (*McCoun*) ascertained the value of the farms. He said he would himself appraise the value of the lots in *Newburgh*. It could not be pretended, that after a purchase of two thirds of the whole property, he had never examined the premises, or that he had not ascertained the situation and comparative value of the *Newburgh lots*; for it is admitted by all parties, that at the time of his purchase from *Drake Seymour*, and his agreeing to purchase of *S. S. Seymour*, he was not incompetent to transact business of any kind. Immediately after this, the negotiation for the one third of the appellant's lots commenced, and that negotiation continued for 18 months before it was verbally concluded; and for one year and ten months before it was reduced to writing. There is, therefore, no pretence, in my opinion, that *Ellison* was not fully acquainted with the premises, proposed to be exchanged with him, by the appellant. Besides having before become the purchaser of two thirds of the lot on the east side of *Water-street*, and the one third of the lot of *S. S. Seymour* on the west side of the same street, and having paid, in each instance, a sum exceeding the price he had agreed to pay the appellant, we have the positive testimony of *Drake Seymour* that throughout the whole of the negotiation he was perfectly competent to transact business. He was in a sit-

Was well acquainted with the premises, and competent to transact business.



uation deliberately to form his opinion, and unquestionably he did do so, as to the value of the *Newburgh* lots; and from his previous purchases, he must have ascertained their value, to his own satisfaction. Under the advice of his agent, he knew the value of the property to be conveyed by him to the appellant. We must take it, then, that *Ellison*, deliberately, and with his eyes open, entered into the contract which the appellant now seeks to enforce by a decree of a Court of Equity.

ALBANY,  
April, 1824.  
Seymour  
v.  
Delancy.

I am, therefore, of opinion, from a review of the whole evidence, that this contract was, at the time the negotiation was first entered into, and at the time the articles were executed by *Seymour* and *Ellison*, *certain, fair and just*, in all its parts.

Contract certain, fair and just, in all its parts.

The next question which presents itself to the consideration of the Court is, whether the contract between the appellant and *Ellison* is so *hard, unreasonable, or unequal*, that this Court will not aid to enforce it.

Whether it was hard, unconscionable, or unequal.

In reviewing this part of the case, it will be the duty of the Court to investigate the evidence as to the value of the *Newburgh* lots, and the farms to be exchanged for them. Should they arrive at the conclusion that *mere inadequacy* in value, where there is *no fraud, misrepresentation, imposition, or concealment of facts*, is of itself sufficient to avoid the contract, it will save a great deal of the labour and investigation which might otherwise be required. I admit, however, that where the inadequacy of price in a contract is so flagrant and palpable as to convince a man at the first blush, that one of the contracting parties had been imposed on by some false pretence, such a contract ought not to be enforced by this, or any other Court of Equity. It is not to be denied, that it is the settled doctrine of the Court of Chancery, that it will not carry into effect, specifically, a contract where the inadequacy of price amounts to conclusive evidence of fraud. In this view of the case, therefore, as well as in reference to the objection of mere inadequacy, I shall briefly examine the evidence of value.

Where inadequacy of price is so great as to evince fraud, the contract should not be enforced.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

There is a distinction between a court of chancery refusing to decree performance of an agreement, and setting it aside. So they will not disturb an agreement that has been executed, though they would not have decreed its performance.

In the first case they leave the party to his remedy at law: in the second, refuse to order the agreement to be cancelled.

For fraud, circumvention, deceit, or misrepresentation, they would order it delivered up to be cancelled.

Whether equity should avoid the contract between S. and E.

Not to carry it into effect would be to avoid it.

If to warrant this the inadequacy should be such as to evince fraud, chancellor's opinion cannot be supported.

It may be proper to premise, that there is a distinction between a Court of Chancery, refusing to decree the specific performance of a contract, and setting it aside. (*Mortlock v. Buller*, 10 Ves. 292.) It is also well settled, that a Court of Equity will not disturb an agreement that has been executed, although they would not have decreed a specific performance. (*Willan v. Willan*, 16 Ves. 83.) In the first case, the Court would leave the party to his remedy at law. In the second, they would refuse to interfere by directing the agreement to be cancelled, the party having consummated his own act. But if there should be fraud, circumvention, deceit, or misrepresentation, a Court of Chancery would order the contract to be delivered up to be cancelled. This case, then, being free from fraud, concealment and misrepresentation, and from the charge of a hasty and unadvised contract, one important question appears to be, can a Court of Equity interfere, under such circumstances, to avoid the contract? For, in my opinion, not to carry this contract into effect is to avoid it wholly. It would be well to consider whether this is a case coming within the rule. For if it be true that the respondents must rest the decree of the Chancellor, principally, on the inadequacy in value of the property to be exchanged; and if it be true that, in order to avoid such a contract, the inadequacy of price must amount to conclusive evidence of fraud, (*Western v. Russell*, 3 Ves. & Bea. 187; *Willan v. Willan*, 16 Ves. 83; *Coles v. Trecothick*, 9 Ves. 246, per *Ld. Eldon*) I do not see in what manner the opinion of his Honor the Chancellor can be supported.

There is no question so well calculated to generate a variety of opinion, as that which regards the value of a village lot, or a farm in the country; and unless the disproportion should be gross and palpable, it would be very difficult to estimate how much more had been given by *A.* for a lot than the price at which *B.* would value it.

This, by the proofs, is the precise case before us. The average value of the appellant's interest in the lots at *Newburgh*, as sworn to by six witnesses, is \$10,856; and this is corroborated by the fact, that the father of the appellant es-

timated the lot east of *Water-street*, several years since, at \$30,000. The average of the farms, as sworn to by witnesses, is \$12,686, and the difference about \$2,186, according to the highest estimate made by the witnesses of the respondents. The lowest estimate of the *Newburgh* lots, by the respondents' witnesses, is between 5 and 6000 dollars. That a difference of opinion should exist among the witnesses, both as to the value of the lots in *Newburgh* and the farms of *Ellison*, is very natural. Every person, at all acquainted with the price set upon real property, and that which is paid when sales do take place in the country, and in country villages, must be aware to what extent an honest difference of opinion does and always will exist. One will venture his fortune in the purchase of property which, in his judgment, will lay the foundation for a comfortable settlement of his family, while his immediate neighbour, with the same knowledge of all the circumstances, pronounces the purchase rash and injudicious. There is scarcely an instance in which a great difference of opinion does not exist, upon the point, whether the purchaser has a good bargain or not. In the country, and in country villages, there is no settled criterion by which property can be estimated. It is not an uncommon circumstance for men to hold on upon real estate, in the hope of getting their price, until the law interferes, and the Sheriff is compelled to solve all scruples on the subject. In the present case, *Ellison*, a man of fortune, and competent to carry into effect his plans for the improvement of the two *Newburgh* lots, impressed with the idea of the growing importance of that village, and influenced, in all probability, by the expectation of the establishment of a navy yard in its vicinity, and being the owner of two thirds of the premises in question, exchanges certain farms in the country for the lots in *Newburgh*. He does this deliberately, freely, and with a full knowledge of the situation of his own property and that which he agreed to take in exchange. There is no ground for saying that there was, in this case, either fraud, surprise, misrepresentation, or deceit. The bargain was conducted by him throughout with great deliberation, and he consummated it with his eyes open. Under such circum-

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Evidence as  
to value of the  
property a-  
greed to be  
exchanged.

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Inadequacy of price, unless it amount to conclusive evidence of fraud, is not itself a sufficient ground for refusing a specific performance of an agreement.

The cases upon this point considered.

stances, we are called on to say, that mere inadequacy of price, and where there is much contradictory evidence; is of itself sufficient to prevent the Court of Chancery from decreeing the specific performance of the contract.

In the case of *Coles v. Trecothick*, (9 Ves. 246) Lord Eldon observed, that inadequacy of price, unless it amounted to *conclusive evidence* of fraud, was not itself a sufficient ground for refusing a specific performance; and, although this was the case of an auction sale, the opinion was pronounced on the general question. In *Mortlock v. Buller*, (10 Ves. 292) the Lord Chancellor declined giving an opinion on the doctrine of inadequacy. In *Western v. Russell*, (3 Ves. & Bea. 187) the defence was *gross inadequacy of consideration*. The Master of the Rolls said that it was not necessary to determine the general question whether inadequacy of price might not be a ground for refusing performance, and he decided the case upon its special circumstances, and held that, as the vendor was not alleged to be under any incapacity or deficiency of judgment, and *set his own price and obtained it*, and never expressed any dissatisfaction, but accused the purchaser of delay, the agreement should be carried into execution. Chancellor Kent admits, that Lord Eldon and the Master of the Rolls had thrown doubt and distrust on this doctrine that inadequacy of price is of itself sufficient to prevent a specific execution.

In *Collier v. Brown*, (1 Cox, 428) it was expressly held, on a bill for specific performance, that if the parties bargained with their *eyes open*, and without *imposition* or *surprise*, mere inadequacy of price was not of itself sufficient to prevent the Court from administering its usual equity. This is the doctrine of common sense and common honesty; for it may be asked, with great propriety, what right have we to sport with the contracts of parties fairly and deliberately entered into, and prevent them from being carried into effect?

I cannot assent to the doctrine, that inadequacy of price may, of itself and without fraud or other ingredient, be sufficient to stay the application of the power of a Court of

Chancery, to enforce a specific performance of a private contract to sell land.

To establish this doctrine in the state of *New-York*, would, to my mind, be sanctioning a principle, which would lead to very injurious results. Every member of this Court must be well aware how much property is held by contract; that purchases are constantly made upon speculation; that the value of real estate is fluctuating; and that there, most generally, exists an honest difference of opinion in regard to any bargain, as to its being a beneficial one, or not. To say, when all is fair, and the parties deal on equal terms, that a Court of Equity will not interfere, does not appear to me to be supported by authority; (*Day v. Newman*, 2 Cox, 77; *Willan v. Willan*, 16 Ves. 83; *Western v. Russel*, 3 Ves. & Bea. 187; *Mortlock v. Buller*, 10 Ves. 292,) and unless I am bound down by some rigid rule of law, I, for one, cannot consent to its introduction into our equity code.

I have not had time to analyze all the cases which have been cited, so as to bring them in review before the Court. The earlier cases are very loosely reported; and we cannot, either from the decisions made, or from the opinions of the Court, form a satisfactory judgment on the particular facts; and from the doubts and disapprobation of Sir *William Grant*, the Master of the Rolls, and of Lord *Eldon*, I feel myself warranted in saying that the point is unsettled in *England*. Nor can I perceive why a contract for the sale of land, which is fair in all its parts, should not be carried into effect, as much as any other contract. In principle there is not, and there ought not to be a difference.

There may be such inadequacy of price as, of itself, to be an evidence of fraud. But wherever this does not exist, and resort is had to the testimony of witnesses, and they differ in their valuation, as in the present case, the contract should be executed. In the case before the Court, the average value of the farms, by six of the *respondents'* witnesses, is \$12,686. Six witnesses on the part of the appellant, (and men, too, of great respectability,) value the *Newburgh* lots at \$10,856. The difference is \$1830. How is it possible for any Chancellor to decide upon the relative weight of

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

Injurious results in this state arising from a contrary principle. It does not appear to be supported by authority.

Earlier cases loosely reported.

Point unsettled in *England*.

There may be such great inadequacy as to evince fraud. If otherwise; and witnesses differ as in this case, the contract should be executed.

ALBANY,  
April, 1824.

Seymour

v.  
Delancy.

such evidence? What can clearly be extracted from such a state of the case is, that it is much better to carry the contract into effect, than that the rule of equity should depend on the judgment of a single individual. It is impossible for any Court to appreciate all the considerations which influence men who enter into speculations of this kind. I admit that the case might present a different aspect, if all the witnesses agreed in opinion. But here is a difference of opinion among some of the most respectable people in *Newburgh*, as to the value of the lots; and the witnesses for the appellant are supported by the former purchases made by *Ellison* when he was as sane as he ever was.

This is stronger for the appellant than if it had been a mere cash sale.

There is another circumstance which has considerable weight with me; and it is that this contract is for the *exchange* of real property. It cannot be denied, that, in such cases, each party is anxious to put a high nominal value on his own land. It is a transaction wholly different, in this respect, from that of a cash sale. Although the *Newburgh* lots did not produce an income proportionate to the value put upon them by the appellant, yet the same objection existed as to the farms; for it appears by the evidence of *Colden*, that they were very much out of repair.

Not such inadequacy as to be conclusive evidence of fraud; and contract being entered into deliberately, and being fair in all its parts, should be executed.

Upon the whole, I am of opinion, that there is not in the present case such an inadequacy of price, as, of itself, amounts to conclusive evidence of fraud; that the contract between the appellant and *Ellison*, in his life time, was entered into with a full knowledge of all the circumstances by *Ellison*, and after much deliberation; and that it is fair in all its parts; and that the respondents ought to be compelled specifically to carry it into effect. (*Coles v. Trecothick*, 9 *Ves.* 246.)

2d point of defence, weight of testimony as to incompetency, clearly in favor of appellants.

I have not entered at large into the consideration of the question raised on the argument, as to the incompetency of *Ellison*; because it appeared to me that the weight of testimony, on that point, was clearly with the appellant; and all the facts in the case show that he concluded the bargain with great care and deliberation. If *Drake Seymour* is to be believed, (and I think he is entitled to the most implicit credit) *Ellison* was perfectly competent to transact business

throughout the whole negotiation, and when he was not so, the subject was never mentioned to him. Indeed, his own agent, *McCorm*, says that when intoxicated, he never knew him attempt to do business. Where a general incapacity is proved, it is the duty of the adverse party to shew competency when the contract was executed; but in the present case all the evidence goes to shew *Ellison's* competency to transact business when the negotiation commenced; and *Drake Seymour* expressly swears to it when the contract was executed.

As to the third point, that the appellant was not in a situation to give a good title to the village lots, either when he contracted, or when the deeds were to be exchanged, I am somewhat at a loss to reconcile the decree of his honor the late Chancellor, with itself. He says, on this point, "that the appellant was in default on the 1st of June, 1820. He ought to have shown himself able and ready to convey on that day;" and that he was in default because the property was encumbered by a mortgage of \$5000.

In conclusion, however, he says that he heard no evidence as to the complainant's title; that in the case of a specific performance, it is the usual course of the Court, to refer the inquiry as to title to a Master. In my judgment, this inquiry extends not only to the actual title, but to incumbrances upon the property. In fact, the Master is to inquire whether the party can make a deed, according to his contract. If he can, it is sufficient, although he was not in a situation to do so when he entered into the contract, or at the time for performance; though it might be otherwise, where one party had been quickened by the other, or where time is of the essence of the contract, as where it relates to stocks or other personal chattels. (2 *Pow. on Contr.* 266, 267. 3 *Eq. Abr.* 690. 2 *P. Wms.* 630, 631. 7 *Ves.* 202. 10 *Ves.* 315. 6 *Ves.* 646. 2 *Cox*, 77. 2 *John. Rep.* 595, 614.)

The appellant's remedy is lost at law, because the property was covered by a mortgage. But that is no objection in a Court of Equity. (*Newl. on Contr.* 89.) It is the peculiar privilege of Courts of Equity to interfere where the

ALBANY,  
April, 1824.

Seymour  
v.  
Delancy.

3d point.  
Whether ap-  
pellant could  
give a good  
title.

It is sufficient  
if the vendor  
can make a  
good title at  
the time of the  
decree, unless  
he has been  
quickened by  
the vendee, or  
time be of the  
essence of the  
contract, as  
where it re-  
lates to stocks,  
or personal  
chattels.

ALBANY,  
April, 1824.

Seymour  
v.  
Delaney.

State of El-  
lison's health  
excused de-  
fault to con-  
vey at the day.

Cause should  
be remitted;  
master to in-  
quire, &c. and  
if, &c. a per-  
formance  
should be de-  
creed.

remedy is defective at law, if it be not against conscience; and if a contract be fair, it should be enforced. (8 *Ves.* 163. 2 *Sch. & Lef.* 347, 352. 9 *Ves.* 608.)

I do not see any thing in this cause which looks like an abandonment of the contract. It is clearly distinguishable from the cases in 1 *Dessaussure*, 382, and 13 *Ves.* 238. Here was no necessity for punctuality, as the parties had taken possession according to the contract. Indeed, the state of *Ellison's* health was a sufficient excuse for not offering to convey at the day. I am satisfied that the general rule is as laid down by the appellant's counsel; and that this case does not come within the exceptions to it.

The cause must therefore be remitted to the Court of Chancery, that the Chancellor may direct a Master to inquire whether the appellant can give to the respondents a clear and unincumbered title to the *Newburgh* lots; and if he can, a decree for a specific performance, according to the contract, must be entered against the respondents.

BOWMAN, BRONSON, BURROWS, BURT, CRAMER, DUDLEY, HAIGHT, LYNDE, M'INTYRE, REDFIELD, THORN, WHEELER and WOOSTER, Senators, concurred.

For affirming,  
10—for rever-  
sing, 14.

A majority of the Court being for a reversal, it was there-  
upon ORDERED, ADJUDGED and DECREED, that one of the Masters of the Court of Chancery be directed to inquire whether the said appellant has, and can give a good title to certain lands in the town of *Newburgh*, in the county of *Orange*, which, by certain articles of agreement set forth in the appellant's bill of complaint, and proved in the said cause, the said appellant had agreed to convey to the said *Thomas Ellison*, deceased, in his life time; and if his Honour the Chancellor, upon the coming in of the report of the said Master, shall be of opinion that such title can be given, that a proper decree be made for the specific performance, by the appellant and the respondents, of the said articles of agreement, and for the execution, by the proper parties, of all necessary conveyances, with suitable covenants for assuring the title, and requiring the appellant and respondents to procure all proper persons to join in such con-



veyance ; and that the respondents, in that case, pay to the appellant his costs in the Court of Chancery, to be taxed ; and it was further ordered that the record be remitted, &c.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

N. B. SUTHERLAND, J. was absent, through indisposition ; and took no part in deciding this, or any of the causes during this session.

---

JOHN WHELAN, appellant,  
*against*

WILLIAM WHELAN and JOSEPH WHELAN, respondents.

*W.* a man, 74 years of age, owning a considerable real estate, the father of 7 children, and whose wife was sickly and irritable, was troubled for several years with dissensions among his children about the management of his property, his wife taking part with all his children on one side, except *Wm. & J.* two of his sons, who took part with him ; and the dissensions ran so high that the mother and the children who took part with her, departed, leaving *W.* and his two sons *Wm. & J.* in possession of the property, the management of which was confided by their father to them, as it had been for some time before the family was broken up. *W.* was credulous and easily led by *Wm.* and shortly after his wife left him, he was sued in a Justice's Court for her board ; and on asking *Wm.*'s advice, *Wm.* told him, that if he intended giving him any thing he wished he would do it ; that, as he and his mother were conducting, he would soon have nothing to give. *W.*'s fears being alarmed by a belief that his wife would dissipate his property, in order to place it beyond the reach of debts which she might contract, he was induced to convey most of his real and personal estate to these two sons, in fee, amounting to more than \$9000, and a farm, &c. to *Wm.* in trust for another son ; but which trust was declared by parol only. Though he had before declared an intention to give all his estate to *Wm. & J.* by way of advancement ; and though they executed to him a bond and mortgage to secure his and his wife's maintenance, and \$50 a year, &c. during their lives ; yet, *held*, that the conveyance, executed under such circumstances, was void, as being caused by fraud, undue influence, and unfounded alarm, excited or countenanced by *Wm.* ; and being also for an inadequate consideration ; and though *J.* might have had no part in bringing it about ; yet, *held*, that it was also void as to him.

To warrant relief, for any cause, in a court of equity, (e. g. undue influence in procuring a conveyance) it must be stated in the bill ; but the charge need not be direct ; it is sufficient if, on a hearing upon the

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Pleadings and proofs, the ground of relief can be gathered from an examination of the whole bill.

A conveyance obtained by children from a father will not be sanctioned by a court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them, the conveyance being also for an inadequate consideration.

A conveyance by a father 74 years of age, his wife being nearly 70 years of age, and in delicate health, to his two sons, of real and personal estate worth more than \$9000, taking from his sons a bond and mortgage to secure his and his wife's maintenance, and an annuity of \$50, during their lives; *held*, to be for a consideration grossly inadequate; it not appearing to be intended as an advancement.

If a representation be made by one to another who is going to deal in a matter of interest upon the faith of that representation, the former shall make it good.

He who bargains, in a matter of advantage, with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence.

One falsely supposing his estate in danger, conveys it to his sons, who know that it is not in danger, but neglect to set the grantor right; this concealment is a sufficient ground for avoiding the conveyance.

Where a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a court of equity sees that any arts or stratagems, or any undue means, or the least speck of imposition, or the least *scintilla* of fraud entered into the bargain, it will avoid the grant.

A deed procured by fraud or undue influence is void and will be set aside in equity, not only as against the one who practiced the fraud or exerted the influence, but as to third persons who have acquired interests under it, though they may be perfectly innocent; thus undoing the whole transaction.

Marriage is a valuable consideration; and a voluntary deed ceases to be so, if a marriage be induced by its provisions; but it should appear in evidence that it was the cause of the marriage. The mere fact, that one holding a voluntary conveyance of property marries, will not make the conveyance good.

Whether a marriage induced by a conveyance or settlement obtained by fraud or undue influence will make it good? *Quere.*

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties to a bill in equity, if within the jurisdiction of the court; but to a bill filed against one to set aside a deed of bargain and sale of land absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party; for the trust not being declared by writing, is void.

A trust must be manifested and proved by writing, or it is void within the statute of frauds.

APPEAL from the Court of Chancery. The appellant filed his bill in the Court of Chancery on the 29th of April, 1822, praying that a conveyance executed by him to the respondents, on the 19th of January, 1821, for his farm, situate at *Johnstown*, in *Montgomery* county, and a bill of sale of personal property thereon, and a conveyance of another farm in *St. Lawrence* county, and the personal property thereon, might be set aside. The bill alleged that the appellant was a native of *Ireland*, of the age of 75 years; that he had resided in *Johnstown* 35 years; that he had 7 children—*Charles*, of the county of *St. Lawrence*—*John*, *Martha* and *Elizabeth*, the last being the wife of *W. Carr*, who reside in the state of *Indiana*—*Mary*, who resides in *Ireland*, and *Joseph* and *William*, the respondents, resident at *Johnstown*. That his farm, at *Johnstown*, contained 350 acres, was of the value of \$8000; upon which the appellant and his wife resided till the autumn of 1820. That some time previous to 1820, in consequence of advanced age and imbecility of body, he resigned the management of the principal part of his real and personal estate to his sons, *John*, *Joseph* and *William*, who resided upon and occupied his farm; that his son-in-law, *W. Carr*, leased the farm in 1819, and left it in the autumn of 1820. That for some time before the appellant was involved in a family quarrel or contention, which arose from unnatural jealousies and dissensions between his children, respecting the use and occupation of his estate; that his wife, *Martha*, aged about 68 years, in delicate health, and peevish in her disposition, took an active part in favour of some of the children, in opposition to the views and wishes of the appellant, which ultimately produced a dispersion of his family in the fall of 1820, by the removal of his daughter *Martha*, *W. Carr* and *Elizabeth* his wife, to the state of *Indiana*, his son *John* having previously removed there, his wife leaving home and taking lodgings with Mrs. *Shurtliff*, in the village of *Johnstown*—the appellant and the respondents thus being left in the sole possession of his farm. That the appellant owned a farm in *St. Lawrence* county, (*N. Y.*) on which his son *Charles* then resided. That he was called upon to pay the board of his wife

ALBANY,  
April, 1824Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

at Mrs. *Shurtliff's*, some months thereafter, which, by the advice of the respondents, he declined; and, shortly after, Mrs. *Shurtliff* commenced an action against him in a Justice's Court. That he left the defence of the suit to his son *William*, whom he directed to ascertain the amount of the demand against him, who informed him, on his return from attending on the suit, that Mrs. *Shurtliff's* demand was \$75, and that the appellant's wife had contracted a debt of about \$100, at *Campbell's*, a merchant in the village of *Johnstown*. That *William* feigned to be very much cast down, upbraided him with not having advertised his mother pursuant to his previous advice, and said that if she was permitted to go on in that way, she would soon dissipate his whole estate, and unless the appellant should immediately do something to prevent it, the respondents would be forced to leave him. That the appellant was in great distress of mind, and sorely grieved at these representations of *William*, confirmed by *Joseph*, and asked what was to be done to prevent his wife *Martha* from dissipating his whole estate. *William* proposed that he should convey to him and *Joseph* his whole real and personal estate, which would put it out of the reach of his wife and the persons dealing with her, and that she would return home if people would no longer trust her; that to secure his maintenance they would give him a mortgage of \$5000 upon the farm, and a bond to pay him \$50 a year, keep a good horse, and furnish him with all things necessary for his comfort and convenience, and indemnify him against the maintenance of his wife; that he, confiding in the representations of the respondents, and desirous of saving his estate, agreed to the proposition. That he proposed to the respondents to go to *Johnstown* to draw the writings, to which they objected, alleging that the lawyers there were all combined against them in favour of their mother, and proposed to go to the office of Mr. *Reynolds*, at *Amsterdam*, in the same county, who was an entire stranger to them, all of which was falsely and fraudulently represented to him, as an excuse to decoy him out of the reach of his old friends and acquaintances, who probably would have advised him from an act so improper and inconsiderate. That

on the 19th of *January*, 1821, the appellant, *William* the respondent, and one *John Clary*, the particular friend of *William*, went to *Amsterdam*, about 12 miles from his residence, and called upon Mr. *Reynolds* to draw a deed of his farm to the respondents; that before the deed was executed, *William* called him aside, and reminded him of his title to about 100 acres of land in *St. Lawrence* county, on which his son *Charles* had resided for 12 years, and insisted that this farm should also be conveyed to him, in trust for *Charles*—that as he trusted the respondents with all the rest, they could safely be trusted with that also. That he, confiding in their honesty and good intentions, consented to put in the deed the farm in *St. Lawrence* county, and also all his personal property in *Johnstown*, and in the use and possession of his son *Charles*, in consequence of the like persuasions and representations; that the deed thus drawn was then and there executed and delivered; that a mortgage was then drawn, on the farm in *Johnstown*, and a bond, in the penalty of \$5000 from the respondents to the appellant, conditioned for the maintenance of the appellant and his wife during their lives, and to pay the appellant an annuity of \$50. That the appellant did not execute the conveyances for the purpose of defrauding his creditors, or of hindering or defeating the collection of any existing demand, but, on the contrary, it was understood and expressly agreed, that the respondents should pay all debts due from him, which were few in number and small in amount; that they had, however, paid little or no attention to his debts. That *William* took all the writings then executed, including the bond and mortgage, and that they were all put into a trunk in the house where the parties lived, and to which he (*Wm.*) had access at all times; that the appellant had been deprived of the possession of the bond which accompanied the mortgage, and that he believed *William* had possessed himself of it, with all title deeds and other papers belonging to the appellant, and had either concealed or destroyed them, so that they were out of his possession or power to regain them; that when the respondents were informed that the bond and other papers had been taken out of his possession,

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

they denied having any knowledge of them, and mocked him by offering to give new ones ; that they fraudulently detained the originals, and concealed them from him. That the personal property conveyed, and since in possession of the respondents, was worth \$400. That at the time of the conveyances the respondents lived with the appellant, have since married, and still continued to live on the *Johnstown* farm, without permitting the appellant to exercise any acts of ownership. That after the conveyances, his wife returned home, remained there a short time, then went and lived with one *Wells*, afterwards with *John Clary*, and finally, in *March*, 1822, the respondents lodged her with one *John Taylor*, a poor man, occupying a log but on the farm ; and that she was in a helpless condition, as well as the appellant, the respondents insisting on their living with them, or at such places as they designated. That he remained in the family of the respondents until about 3 weeks before he filed his bill, when he thought it most prudent and safe to depart ; and he took up his abode with *Henry Cuyler*, where he was at the filing of the bill, without the means of making him a compensation.

The bill then charged, 1. That the appellant was induced, by the persuasions and false representations of the respondents that their mother was spending the whole estate, to execute the deed for the purpose of preventing it, and upon no other motive: 2. That at the time he executed the deed, he did not intend to make any settlement or disposition of his estate whatever, more than to remove it out of the reach of his wife *Martha*, so that she might not, by her extravagance, spend or incur it : 3. That there was no other moving cause to execute the deed, but the persuasion and representation of the respondents of the absolute necessity of so doing, to prevent the whole estate being dissipated by their mother ; and that the bond and mortgage were proposed to be given by the respondents merely to give colour to the transaction ; and that the terms of these were altogether dictated by them, and acceded to by him, he not believing that the plan was to make him wholly dependent on the respondents for a living: 4. That the respondents have

not complied with the condition of the bond : 5. That 3 or 4 years since, the respondents purchased a farm adjoining the appellant's, for the sum of \$2000 ; that the complainant, to assist them in paying for it, loaned them, at different times, \$800 and upwards ; and that, about a year ago, (in the spring of 1821) he borrowed of their brother-in-law, *T. Goff*, \$170, for which he gave his note, which note the respondents pretend to have purchased, and to hold as a debt against the appellant, and that they refuse to pay him his annuity : 6. That on or about the 8th of *June*, 1820, and while his wife *Martha* was from home, the respondents moved and persuaded him to give one or both of them a conveyance of the *Johnstown* farm, for the purpose of preventing his wife from running him in debt, and encumbering his estate ; that in *August* or *September* following, *William* being dangerously ill, and his life despaired of, the respondents re-conveyed this to him, but yet pretend that they will avail themselves of the conveyance to them, and withhold the deed from the appellant.

The bill prayed for a re-conveyance to the appellant, &c. and for an injunction, and was sworn to by the appellant.

The respondents, on the 7th *November*, 1822, answered separately. *Joseph* admitted all the preliminary facts stated by the appellant ; but denied that he ever made any false representations to his father, to induce him to execute the deed to himself and *William*, in *January*, 1821 ; or that he knew the intention of his father, to execute such a deed, until it had been completed at the office of *Mr. Reynolds*.

*William* denied telling the appellant, that his wife had contracted a debt of \$100, or any other sum, with *Campbell*, or that he ever called on *Mrs. Shurtliff* respecting her demand for board, until after the deed of *January*, 1821, was executed, or that he had informed the appellant that he had done so, or that her demand was \$75, or that he had told the appellant that if his wife was permitted to go on in this way, she would, in a short time, involve him in debt, and dissipate his whole estate, or any thing to that effect ; otherwise than as hereinafter mentioned by him. He admitted that on the evening of his and his father's return from *Albany*, about the 18th *January*, 1821, they found a copy of a

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whalen  
v.  
Whalen.

summons against the appellant in favour of Mrs. *Shurtkiff*; that the appellant then asked him what was to be done; that he then told his father, as he had often told him before, that if he had any thing to give him, he wished to know it; otherwise, he would abandon the farm; that, as the appellant and his wife were acting, they would soon have little enough for themselves. That the complainant answered, he had always intended the farm and the personal property for the respondents; and it was then agreed, that a deed should be executed to them for the real, and a bill of sale for the personal estate, which was accordingly done, and the bond and mortgage executed as mentioned in the bill. He detailed what passed at the office of Mr. *Reynolds* in his presence and that of *John Clary*; that as near as he could recollect, the appellant stated to Mr. *Reynolds*, that he owned a farm in *Johnstown*; that his wife refused to live with him; that he was apprehensive she would run him in debt; that the merchants would trust her, and he should have to pay her debts; that he had understood he should be charged \$5 a week for her support, and, at that rate, he could not support her, and he was determined to provide for her maintenance on the farm, and get rid of all his estate, so that he could be kept in goal but for a limited period; that he intended his farm and the personal estate upon it, for the respondents, and he might as well give it to them to-day as to-morrow; and then stated what his sons were to give, and secure to him for the farm, and the personal property. That he, at the same time, conveyed the farm in *St. Lawrence* county, on which the appellant's son *Charles* lived, to *William*, who promised that he would do with it, and convey it to *Charles*, as the appellant should direct; and that he has always been, and still is ready to do so.

Both of the respondents admitted, that on the 20th January, 1821, they received from the appellant, a bill of sale of the personal property on both the farms; the personal property on the farm in *Johnstown* to belong to the respondents; and that in *St. Lawrence* to be held for *Charles*, or to be disposed of for the benefit of him as the appellant might di-



ALBANY,  
April, 1824.Whelan  
v.  
Whelan.

rect ; that the personal property of which they possessed themselves does not exceed \$245 in value ; and that they have never possessed themselves of that in *St. Lawrence* county.

*William* admitted that they were to pay all his father's debts, except the debt due *Goff*, which he and *Joseph* were bound to pay ; and that they have complied with this part of the agreement. He denied that he took away the bond and mortgage executed to the appellant, or that they were, to his knowledge, placed in an unlocked trunk in the house, as charged in the bill.

*Joseph* further answered, that when he executed the bond and mortgage, he believed the conveyance to *William* and himself to be an absolute deed, subject only to the claims secured by the bond and mortgage. And he denied that the bond and mortgage were intended as a mere cover to the transaction, or that they were proposed by *William* ; but that, on the contrary, the transaction was fair, &c.

Both answered, that immediately after the deed was executed, they took absolute possession of the farm ; and that the appellant, for about 10 months afterwards, was satisfied with the transaction. That they respectively married in *May*, 1821, and *February*, 1822, and lived together on the farm. That in 1821, their mother came to reside with them, and continued with them about 4 months ; that she then lodged with *Wells*, of *Amsterdam*, till the winter of 1821-2. She then removed to *John Clary's*, where she continued till *April* or *May*, 1822, and then removed to *O. Taylor's*, where she continued till the bill was filed, when she came to reside with the respondents. That they never refused to pay *Wells* for her board. They admitted the conveyance in *June*, 1820, by the appellant, to them, of the farm at *Johnstown* ; that a mortgage thereon was executed, for \$3000, by *William*, to the appellant ; and that, on the request of the latter, they re-conveyed to him in *September* following, *William* being then dangerously ill. That they know of no consideration or cause for this conveyance to them, unless it was in consequence of an expected prosecution from one *Lobdell*, and to defeat his recovery.

ALBANY,  
April, 1824.

Wheelan

v.  
Wheelan.

*William* further answered, that in *February* or *March*, 1822, he was charged with being in possession of the bond and other papers. He denied that he ever had them after their execution, or that he knew where they were, until a few days before the filing of the bill. He supposed the bond had been sent with the mortgage to be recorded, or that *Alexander M'Call* had it; but he had since been informed that the bond was with his papers, at *Hugh M'Call's*; and that it was, with other papers, delivered to him in *June*, 1821, although he had no recollection of it.

Both admitted, that on the purchase of the farm adjoining their father's, for \$2000, he gave them \$500 towards the purchase money; that this was in 1817; that he at the same time borrowed \$170 of *Goff*, which they are bound to pay.

Both insisted, 1. That they purchased the farm for a good and valuable consideration, being the bond and mortgage executed by them; that the conveyance was not procured by representations that their mother was spending the whole estate, or any other false representations or persuasions; but that the appellant, of his own free will and accord, conveyed to the respondents, by way of settlement and advancement. 2. That it was in pursuance of a previous contract, well understood and agreed upon, that the conveyance was made; and that the persuasions and representations of the respondents, of the necessity of the conveyance to prevent their mother from dissipating the estate, were not the only moving cause for making the conveyance and bill of sale.

*Joseph* admitted that he had held himself out as a *bona fide* purchaser for a good and valuable consideration secured to the appellant; and that the principal consideration for making the conveyance and bill of sale, was the natural love and affection which he had for the respondents. That, previous to the conveyance, he had made no contract or agreement with the appellant, respecting the purchase of the farm; and that the appellant executed the deed on a contract well understood between him and *William*.

Both admitted, that the manner of using and occupying the appellant's real and personal estate had been a source of contention in his family for a number of years; and it was

difficult for any of his children to have his good opinion for any great length of time. That he frequently changed his opinion and wishes respecting them ; and as often wished to give one or the other a greater share in the management and use of his estate. That their mother had sometimes appeared to favour those children the most whom the appellant, at the time, was most inclined to oppose ; so that it was difficult for any one of the children to enjoy the good opinion of the appellant and his wife at the same time. And that the dissensions in the family had induced some of the children to remove, at the times mentioned in the appellant's bill.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

The cause having been put at issue in the Court of Chancery, by a general replication to both answers, witnesses were examined on both sides,

*Testimony for the appellant, (taken in 1823.)*

*Daniel Wells*, had been acquainted with the appellant for 15 years, and believed him to be credulous and easily persuaded, by those whom he believed to be his friends. Witness had heard and believed that the appellant's wife had been badly treated, and suffered to wander abroad. She lived at witness' house about nine weeks ; and *Joseph Whelan* refused to pay for her board.

*Marcus T. Reynolds*, had known the appellant and *William Whelan* for about 2 years. On the 19th of January, 1821, they came together, with *John Clary*, to witness' office, and either the appellant or *William* requested him to draw the deeds, but which he did not remember. He did not recollect distinctly all the conversation that passed. The appellant stated he had been prosecuted for the maintenance of his wife, and that a recovery had been had against him, and that he was fearful he would be harrassed with law suits from time to time, for his wife's board and maintenance. But the witness did not know that the law suit was the cause of the conveyances ; though he believed the reasons assigned by the appellant were among the inducements to the conveyances. That he drew the deed of the farm in question, and subscribed his name as a witness ; and after its execution, some conversation took place between the appellant and *William*, relative to the *St. Lawrence* farm. Conveying

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

it to *Charles Whelan*, who lived upon it, was talked of, or to his children ; but it was finally conveyed to *William*, in trust for *Charles* and the children, to be conveyed to such of them as the appellant should direct. That the appellant appeared not to be prepared or anxious to exact a stipulation from them for the support of himself and wife, until (after the conveyance executed) the propriety of this had been suggested to him ; and then the parties agreed upon the terms of the bond and mortgage mentioned in the pleadings, which the witness drew.

*Rebecca Cuyler*, had been acquainted with the parties for 14 years, during which time they had been in easy circumstances. The appellant and his wife lived at variance for several years, in consequence of strife and jealousy between the appellant and his children, about the use and management of his real and personal estate. The appellant's wife left her family, and went to reside with *Mrs. Shurtliff*, in the fall of 1820.

*Jacob A. Cuyler*, had been acquainted with the parties for 15 years, and they were in easy circumstances. He knew the manner in which the family had lived. The appellant and his wife had lived at variance, arising from strifes and jealousies between the appellant and his children, about the use and management of the real and personal estate. He had found the appellant easily led by *William*. In the family strife the appellant and the respondents were usually on one side, and the appellant's wife and the other children opposed to them. In his opinion, the appellant's real estate in *Johnstown* was worth \$9,000, and would have rented for \$250.

*Margaret Taylor* had been acquainted with the parties for 13 years ; and did not believe the appellant could have been easily persuaded by any person but his son *William*. For the last 2 years, the appellant's wife had been treated with coldness and neglect, and suffered to wander abroad and seek her living among strangers. Heard *William* say he would not pay any thing for her maintenance while abroad ; and heard her request *William* to furnish her with diet more suitable to her state of health, who said he would do so when he should go to *Albany*.

*Henry Cuyler*, had been acquainted with the appellant and his family for 30 years. He concurred with the other witnesses as to contention in the family and its cause, and as to their circumstances in life. He had found the appellant easily led by *William*, who with *Joseph* were the appellant's friends and advisers in 1819-20, when there was great strife and litigation in the family. He concurred as to appellant's wife wandering abroad, and the respondents refusing to pay for her board, because they had means provided for her to live at home. He considered the real estate worth \$8000, and the personal about \$170. He heard the appellant say he had conveyed the farm to the respondents to prevent unlawful claims against him by means of his wife.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

*D. P. McNaughton*, had known the family for 25 years; and concurred as to their strifes, &c. and their circumstances as to property; that the appellant was easily led by his son *William*; and as to the respondents' siding with the appellant in family disputes. He was present when the bill of sale and the bond and mortgage were executed. The appellant said it was a hard case for him to make an assignment of his property; for it was done for the express purpose of preventing *Martha* his wife from spending his estate. The appellant directed *William* to take the papers to the Clerk's office, have them recorded, and return them. He heard *William* request his mother, who lived at *Henry Cuyler's*, to go home, otherwise, he told her, he would not provide for her; but said if she would go home she should have a room and be treated as a mother. She declined going home. This witness agreed with *J. A. Cuyler* as to the value of the real estate.

*Alexander McCall*, aged 21 years, had known the parties from his infancy, and they had been good livers. He concurred with the other witnesses as to the strife in the family, and its cause. The appellant was a credulous man, and easily persuaded by those whom he believed to be his friends. Witness' father, *Hugh McCall*, had in his possession the deed, bond and bill of sale. He testified that the real estate was worth \$8000, the personal about \$200; and the yearly rent of the real would have been about \$250.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

*Hugh McCall* had known the parties and the family 24 years, and concurred as to the value of their property, their strife and its cause. He stated that the appellant's wife boarded at Mrs. *Shurtliff's*; and *William* said that the price of her board was \$5 per week. That *William* left with the witness the deeds and bill of sale with the bond; and which were afterwards taken away by *William*, as the witness was informed by one of his children and believed. He heard the appellant demand the bond of *William*, who told him to ask *Alexander McCall* for it. Witness then asked *William* whether he had not the bond, whereupon he left the witness and the appellant, without giving any answer.

*Nancy McIntyre*, had been acquainted with the appellant and his family for 30 years, lived near them, and they had always been good livers. The appellant's wife had been ill treated by the family for a number of years.

*Charles Whelan*, a son of the appellant, of *Louisville*, in *St. Lawrence* county, concurred as to the strifes of the family and the cause. The appellant was a man credulous and easily persuaded to any thing by those he supposed his friends; and he might be persuaded to do any act dictated to him when any fear of difficulty might threaten him or his property. He heard *William* say that the appellant had, by his advice, put his property out of his hands to prevent the creditors of *Martha* his wife from getting any thing from him for her board and maintenance abroad. That on the 24th February, 1823, the witness advised *William* to settle this controversy, and remove on to his own farm, giving up possession to the appellant. But *William* said that he would not; that he had now got the old man into the situation he wanted him; that he had worked to get him into that situation for 10 years; and that he would not give up an acre, unless the appellant would come to his terms.

*Testimony for the respondents, (taken in 1823.)*

*John Clary*, aged 38 years, had been acquainted with the family from his nativity. He heard the appellant say at Mr. *Reynold's* office, on the 19th January, 1821, and afterwards at the appellant's house, and a number of times subsequent,

that he intended to convey his property in *Johnstown* to his sons *Joseph* and *William*. He had also said the same thing at the house of the witness. He was present at the appellant's house when the bond and mortgage were executed, and, with *Duncan P. McNaughton*, subscribed his name as a witness to them; at which time he heard the appellant say he had conveyed his farm in *Johnstown* to the respondents. He went in company with the appellant and *William* to the office of Mr. *Reynolds*, at the request of both parties, on the 19th January, 1821. There he heard the appellant, *William* being present, say to Mr. *Reynolds*, that he came to convey his farm in *Johnstown* to *Joseph* and *William*; that he did so for the purpose of saving it from the creditors of his wife; that he had been sued for her board the day previous by Mrs. *Shurtliff*; that the reason he came to *Reynolds*' was because he could not trust the people of *Johnstown*; and that he had been informed that if he was not a freeholder they could not confine him more than 30 days on the limits for debt. The deed in question was then drawn, and executed, and was witnessed by the deponent and Mr. *Reynolds*. After the execution of this deed, the appellant stated that the people in *Johnstown* would still know that he was a freeholder in the county of *St. Lawrence*; and therefore it would be necessary for him to convey his farm there to some person, as it would not be safe to convey it to his son *Charles*, he being in debt. That he would convey it to *William* in trust for *Charles* and his children, and by *William* to be conveyed as *Charles* should direct. He did not hear *William* say any thing to induce the appellant to make the deed to him; nor did the witness say any thing to induce him to make the conveyance. He had heard the appellant say, "I protest to God, a child belonging to me shall not have one cent's worth of my estate, but my sons *Joseph* and *William*; for the others robbed me of all I had; they have not left me a chair to sit on." He concurred with the other witnesses as to the strife in the family and its cause. The contentions in the family had taken place within the last 4 years. The appellant's wife resided with the witness, in *March* and *April*, 1821; about 5 weeks, there being no contract as to the price of her board. *Joseph* and *William* were to pay the witness, and had

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

paid a part. He had heard the respondents say they could as well support her at home, and find her all that would be necessary for her comfort ; and *William* stated that he could not maintain her abroad. She had been weakly and out of health for several years ; and peevish and irritable in her feelings. Previous to going to Mr. *Reynolds*, the family had always had their business done at *Johnstown* village. The appellant was a perfect stranger to Mr. *Reynolds* ; but *William* appeared to be acquainted with him. The distance from the appellant's to Mr. *Reynolds*' was about 10 miles ; and to *Johnstown* village about 4 miles. Witness was present when the bill of sale was executed ; the reasons assigned for which were the same as those for conveying the real estate. The strife in the family had the effect to drive some of them abroad.

*Mary Kane*, heard the appellant, in 1820, and at several times after, say that he meant to convey his farm and property to *Joseph* and *William* ; and in *April* or *May*, 1821, he said he had given them a great bargain, for he had let them have the farm for a mere trifle, in comparison with what he ought to have had for it, or was offered for it before. That he now only got the support of himself and wife and \$50 a year ; and *Joseph* might now see (contrary to what his mother had wished to make him believe) that the appellant had not sent for him to make a negro of him ; for he had done well by him. That in *October*, 1821, the appellant said he was satisfied with what he had done in regard to conveying his property to the respondents.

*Thomas Goff*, saw the appellant at *Albany* in the fall of 1820, and he said he intended to convey all his property in *Johnstown* to *Joseph* and *William*. That his son *John* and his son-in-law *William* had taken away almost all his property, and left him considerably in debt ; and he would give the remainder to the respondents, who remained with him to take care of him ; that this was in consideration of their good conduct, and he would reserve enough to live on. He applied to the witness for a loan of \$1000, and offered to give him good security, which he supposed was his farm. He is a brother-in-law of the respondents, who married his sisters.



*Catharine Goff*, heard the appellant say, in the winter of 1821, that he conveyed, or would convey his property to the respondents ; and he found fault with his son *John*, and son-in-law, *William Carr* ; stated that they had robbed him, and left him nothing but the house and land ; and should not have a cent's worth more of him.

*Mary Hanessey*, sister to the respondents' wives, lived in the respondents' families in the summer of 1821, and till the month of *August*, 1822 ; heard the appellant say that *Joseph Whelan's* wife used the old lady better than her own daughter ever did ; that the old woman wanted a considerable attention to make her comfortable ; that he had conveyed his estate to the respondents, and was perfectly satisfied ; that he expected no more than \$50 a year : that in *March*, 1822, he demanded his rent of the respondents, who replied they would pay him his rent, if he would deliver up to them a certain bond. He said he would close the bond upon them. They replied, the bond was good for nothing. On the same day he said to the witness, it was astonishing the boys would not give him his rent ; but he was glad he had not received it ; for then he could not get back his land. The appellant's wife, from bodily infirmities, made herself very unhappy in the family ; often complained of ill treatment and bad usage without a cause ; had heard the respondents try to coax their mother to live at home.

The consideration stated in the deed of the *Johnstown* farm was \$5000.

Upon the above pleadings and proofs, the Chancellor dismissed the appellant's bill ; for which he assigned the following reasons :

THE CHANCELLOR. The complainant seeks to annul his own conveyances to two of his sons. These conveyances are valid, unless they were obtained by fraud ; the answers of the defendants deny all fraud ; and after a careful consideration of all the proofs taken in the cause, I am of opinion, that no fraud is proved.

The testimony most favorable to the complainant, is that of *Charles Whelan*, who states, that on the twenty-fourth

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

day of February 1823, the defendant, William Whelan, declared in substance, that he had worked ten years to get his father into his present situation, and that he would not give up the farm.

This testimony does not show, that fraud was practised in obtaining these conveyances. But this witness, who is another son of the complainant, can not be impartial, since, if his father should prevail in this suit, he may well expect to receive some portion of the property : and he himself says, that he has no reason to expect any thing more, in that event, than a son may expect from a father, or a child's portion.

Upon the whole case, it does not appear, that these conveyances were obtained by fraud ; and the suit must therefore, be dismissed.

The complainant in making these conveyances of all his property, has been very improvident, but he had power to dispose of his property, and he is not at liberty to revoke his own conveyances from mere repentance. I have no power to vary or dispense with the principle, that such a conveyance is valid against the grantor, when it is free from fraud. But the question of costs, is in the discretion of the court. And as the complainant is now poor, and unable to pay costs, and has become so by his imprudent generosity to his two sons, the defendants ; it will I think, be a reasonable exercise of discretion, to dismiss the suit without costs, against the complainant.

After entering the appeal in this cause, and before the argument on the merits,

Mr. *H. Cunningham*, the solicitor and counsel for the appellant in the Court below, and who argued the cause there, moved this Court for a rule allowing the appellant to prosecute here in *forma pauperis*, which was opposed by

Mr. *D. Cady* ; but granted.

Owing to Mr. *Cunningham's* engagements as a member of the House of Assembly, then in session, he did not argue upon the merits.

ALBANY,  
April, 1824.Whelan  
v.  
Whelan.

*H. Bleeker*, for the appellant. These conveyances were executed under such circumstances that a Court of Chancery ought to set them aside. The weakness and incapacity of the appellant, and the influence of the respondents over him, will be found abundantly established by the evidence. They were always on his side in the quarrels which disturbed this old man of 75—they were his sons, his agents in the management of the property, in whom he implicitly confided. He was easily led, and exhibits great mental weakness in the silly notions which he formed as to the amount which might be recovered of him for his wife's board, and the probability that it might ruin a man of his estate. He was prejudiced against all his family except the respondents, who, it is plainly inferrible, seized on a favourable moment, and induced him to disinherit all his other children. The evidence of any intention to convey to these sons, before the fatal summons was served on him at the suit of *Mrs. Shurtliff*, is extremely slight, and wholly disproved by the entire evidence. It was that trifling circumstance which worked him into a state of alarm, and enabled the respondents to profit by his fears; and it is plain that these formed the whole or the principal ground of the conveyance.

Whether there is fraud actually proved or not, the consideration was so grossly inadequate, as to warrant an inference of fraud, (*Gwynne v. Heaton*, 1 Br. Ch. Rep. 8, 9) independent of delusion or mistake. Here is much besides inadequacy. All was conducted by the advice of *William*, even to the conveyance of the farm in *St. Lawrence*; and the conduct of the sons, afterwards, places their original motives in a very questionable point of light. Even the bond securing their father's maintenance and small annuity is withheld.

For the effect of fraud upon a conveyance, I refer to *Underhill v. Harwood*, (10 Ves. 209) *Boyd v. Dunlap*, (1 John. Ch. Rep. 482) and *Wendell v. Van Rensselaer*, (id. 350.) In the latter case the Chancellor refused to set aside the deeds, but from his reasoning, and the cases cited, it is evident he would have interfered and set them aside, had a case strong as the present been made out. *Huguenin v. Basely*,

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

(14 *Ves.* 273) was a voluntary settlement by a widow, upon a clergyman and his family, compassed by his undue influence over her, having first got the management of her affairs. This was set aside, on the same grounds of policy as are applicable to the relation of guardian and ward. One who is the actual guardian of another, or one who is placed in a relation holding the same degree of influence, should come within the same salutary rule. The Court decided the case last cited upon the principles and authorities advanced by Sir Samuel Romilly, and the other counsel concerned for the complainant, to which I refer as a lucid exposition of the doctrine on this head. *Hatch v. Hatch*, (9 *Ves.* 292) and *Chesterfield v. Janssen*, (2 *Ves. Sen.* 155) both contain principles applicable here; and in *Griffin v. De Veulle & others*, (3 *Wood. Lect. App.* 16) a deed was set aside, under circumstances less strong than those presented by the present case.

In determining whether there be fraud, the Court will look to all the circumstances of the case, the weakness of the appellant, and the relation of the parties. (1 *Mad. Ch.* 224.) Proof of actual fraud is not necessary, but may be inferred from such relation, or other circumstances. (*Evans v. Llewellyn*, 1 *Cox*, 333, 339. *Wright v. Proud*, 13 *Ves.* 136, 137.) Misrepresentation, age, inexperience, parental influence, confidence, a confiding temper, improvidence, distress and negligence, in the vendor, are grounds for setting aside a sale. (*Wyatt v. Grove*, 2 *Sch. & Lef.* 492. *Murray v. Palmer*, *id.* 474. *Carpenter v. Herriot*, 1 *Eden*, 338. *Bones v. Heaps*, 3 *Ves. & Bea.* 119. *Wharton v. May*, 5 *Ves.* 27, 67. *Griffiths v. Robbins*, 3 *Mad. Ch. Rep.* 191. *Gibson v. Jeyes*, 6 *Ves.* 267, 278.)

*A. Spencer*, (same side,) would give the gentlemen, who were to answer, notice, that he should, in reply, rely on the following authorities: To show that if void as to *William*, the deeds were so as to *Joseph*, though the latter might not be implicated in the fraud, *Huguenin v. Basely*, (14 *Ves.* 273, 288;) to shew the effect of the *suppressio veri*, undue advantage and inadequacy of price, 1 *Mad. Ch.* 208; *Jervois v. Duke*, (1 *Vern.* 19) *Broderick v. Broderick*, (1 *P. Wms.* 239) *James*

ALBANY,  
April, 1824.Whelan  
v.  
Whelan.

*v. Graves*, (2 *id.* 270) *Bowles v. Stewart*, (1 *Sch. & Lef.* 209) 1 *Mad. Ch.* 211; 1 *Fonbl.* 113; *Newland on Cont.* 365-6; that the conveyances should be set aside, notwithstanding the grantor's object was to screen his estate from the payment of his debts, *Young v. Peachy*, (2 *Atk.* 258;) that the vendor's acquiescence is no objection, *Murray v. Palmer*, (2 *Sch. & Lef.* 486) *Crowe v. Ballard*, (1 *Ves. Jun.* 215) *Roche v. O'Brien*, (1 *Ball & Beatty*, 330;) that the respondents cannot avail themselves of the statute of frauds, as to the use in favour of *Charles* in the *St. Lawrence* farm, though this was not declared in writing, 1 *Mad. Ch.* 305; and that the marriage of the respondents will not vary the case, if the conveyances were originally invalid for fraud, *Sterry v. Arden*, (1 *John. Ch. Rep.* 271.)

*D. Cady & B. F. Butler*, for the respondents. We shall insist, that the decree of the Chancellor should be affirmed, for the following, among other reasons:

1. Because there is nothing in the pleadings or proofs which shows that the respondents, or either of them, possessed or exerted any such influence over the appellant, as should avoid his deed to them.

2. Because, if any such influence existed, the appellant has not, by his bill, made that the ground upon which he asks relief; but he rests his claim for relief, upon the ground that the respondents had practised a fraud upon him, by making false representations respecting debts contracted by his wife, and thus obtained a conveyance from him of his estate in *Johnstown*. That charge being positively denied by the respondents, and not supported by the proof, the complainant can be entitled to no relief.

3. Because, as it appears from the pleadings and proofs, that the respondents were unmarried at the time the appellant conveyed the estate in *Johnstown* to them, and that they both, soon after they took possession of the estate, were married to women, to whom, or to whose friends and connexions the appellant had declared the respondents were the owners of the estate, it would be "against public policy, and contrary to equity and good conscience," to permit him now to avoid that conveyance.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

4. Because the deed for the farm in the county of *St. Lawrence*, was given to the respondent, *William Whelan*; and it appears from the proofs, that it was given in trust for *Charles Whelan* and his children, and to be conveyed to such person as *Charles Whelan* should direct: *Charles Whelan*, therefore, is a necessary party to any question respecting the validity of that deed; and without his being a party no decree for a re-conveyance can legally be made.

There is much irrelevant matter in the bill. Many of the charges relate to a time long after the deed was executed; and their admission by the answers, or establishment in proof could have no possible influence. (*Morris v. Burroughs*, 1 *Atk.* 404.) What has the ill usage of the mother, for instance, to do with the case? But these charges are denied by the answers; and there is a failure to establish them in proof. There is very little testimony to any of them, and that is slight, general, imperfect, and can weigh nothing against the positive denial in the answers.

Many cases have been cited as to undue influence, and this transaction has been placed in a variety of shapes. Sometimes it has been likened to a deed from a ward to his guardian; sometimes like one from a *cestui que trust* to a trustee, or a client to his attorney; and sometimes the case has been precisely inverted, by making it like a deed from a child to a parent—not from a parent to his children. But there is obviously no sort of analogy in any of the cases relied upon. They are those where influence or overreaching may be presumed, and, upon principles of policy, is presumed by the law. (*Morse v. Royal*, 12 *Ves.* 371.) If a case could be found of undue influence exercised by a child, over a father, or presumed without proof, it would, we admit, go to make out the appellant's case; but we believe both the cases and the rational presumption are rather the other way, and in favour of the father's influence over the child and this, we presume, is the first time that the contrary was ever pretended. (*Vid. Middleton v. Kenyon*, 2 *Ves. Jun.* 391, 413.)

In simple truth, the deed was an advancement to these children, long in contemplation, and deliberately executed:

a species of conveyance, highly favoured in the law, and good even without any other consideration. A deed to a stranger, without pecuniary consideration, enures to the use of the grantor, but it is otherwise where the consideration of blood intervenes. There the use passes to the grantee, without any other consideration.

*Huguenin v. Basely*, (14 Ves. 273) is so much relied upon for the appellant, that we are referred not only to the case but the argument. What is the case? One of mere imposition, influence and fraud, exerted over a female, who was a stranger to the value of the estate which she granted, and who resided thousands of miles from it. The letter, incorporated in the report, was considered as decisive evidence of undue influence. Reliance was placed by counsel, upon the defendant's being the spiritual guide of the plaintiff, on the authority of *Pothier*; and this author, with the concurrent authority of Lord *Hardwicke*, is cited against the exercise of bounty to an *administrateur*, or one managing the affairs of another. To apply the argument and principles of that case, the facts should have some analogy to the present; but none can be shown. Here the appellant had resided on his farm for 35 years, was perfectly acquainted with its value, and had tried the temper and capacity of the respondents, his children, to whom he makes the advance. *Griffiths v. Robins*, (3 *Mad. Rep.* 191) was the case of a female donor, 84 years of age, nearly blind, dependent upon and placing a confidence in the donee, granting her estate, and reserving a very inadequate annuity. That is not this case. The appellant was capable of managing his own affairs. He secures to himself and wife a comfortable living, beside \$50 annuity, and the payment of all his debts, out of a farm which would rent for only \$250, a sum, in itself, utterly inadequate to the purposes of their maintenance. *Lewis v. Pead*, (1 *Ves. Jun.* 19) is much more analagous. Mrs. *Lewis*, when 75 years of age, leased for 99 years to *Jones*, a stranger, for £70, a very inadequate rent, the premises being worth £180; and *Jones* boasted that he had made a bargain worth £300. On a bill filed by her son to set aside the lease, per *Buller, J.* "There must be some substantial

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ground for supposing fraud stated and proved. Her being old is no proof that she was imposed upon. She did not choose to acquaint even her own attorney with her reasons for granting this lease. There is no sort of fraud in the original concoction of the business. We have seen the greatest abilities displayed at a greater age than 75 ; therefore, that alone can be no ground to presume imposition. She had a right to make this contract ; and though the reasons of her favour to this man do not appear, that does not signify ; and it appears she lived on bad terms with her son the plaintiff."

We do not deny that there may be such influence of the son over the father as to avoid a deed ; but what is the proof of influence in this case, if it is to be deemed in issue, which we deny ? None of the witnesses state any particular facts or instances, from which influence is to be inferred. All is mere general opinion. Even in a case of confirmed lunacy, a host of opinion will not prove it, but the facts and grounds of inference must be stated. (*Coop. Med. Jur.* 289.) Is it enough that these children sided with their father in the family controversies ? He was morally and legally the head of the family, and it was the duty of all the children to side with him. These did so under all circumstances ; and is this to be imputed to them as a crime ? If they were scoundrels for siding with him, he was the greater one, and has no right to allege this against his children. Every presumption is in favour of a deed from a father to his son, till positive fraud be shewn. (1 *B. & P.* 120.) An attorney, while carrying on a law suit, is not allowed to take a deed from his client ; but it is otherwise, if the client be the father of the attorney.

It is enough that undue influence is out of the question, as not being charged in the bill. The complainant cannot go beyond the allegations there. (*Gouverneur v. Elmendorf*, 5 *John. Ch. Rep.* 82-3. *James v. McKernon*, 6 *John. Rep.* 559.) All fraud is denied, and there is not the semblance of proof to establish it. To do away the answer, there should be two witnesses contradicting it, or, what is equivalent, one witness and potent circumstances. (*Woodcock v. Bennet*, 1 *Cowen's*



*Rep.* 711.) The pretended misrepresentations relate to Mrs. *Shurtliff*, and the affair of board and the law suit ; but *William* never saw her till after the deed, and could have made no representations on the subject. The farm must be lost, it seems, because certain facts were suppressed ; but it must be shewn first that they were known. The appellant talked to Mr. *Reynolds* about \$5 per week for his wife's board ; but his knowledge was not and could not have been derived from *William*. All which was said as to this and the \$100 debt, and the consequent danger of dissipating the estate, was mere matter of opinion, and not the subject of the *suppressio veri*. Nor is there evidence that the facts, were untrue. This should be shewn, and that *William* knew them to be untrue.

ALBANY,  
April, 1824.  
Whelan  
v.  
Whelan.

*Charles Whelan* is obviously interested, and his testimony must be laid out of view. The appellant deliberately approved of what he had done, long after the conveyance ; and the case is stripped of every thing like surprise, the ground which Courts of Equity usually lay hold of, in these cases, to set aside conveyances, as in *Evans v. Llewellen*, (1 *Cox*, 333.) For 5 years the appellant had been saying to these respondents, " This farm belongs to you ;" and avowing his intention to convey it to them, among his neighbours. He did convey the same land in 1820. On *William's* falling sick, this was annulled. Every thing shews deliberation. We are told that he was alarmed by the summons and the law suit. Were these calculated to alarm a man worth \$8000 ? He must have known that at the worst the recovery could not exceed \$50 ; and the most that can be said is, that had it not been for the summons he would not have conveyed on that very day, but reserved the same act till some short time after.

Inadequacy of price is also insisted on. We ask a case where a deed from a father to a son was ever impeached for that cause. It might be a good objection in the mouth of a creditor ; but as between the parties, even had the deed been to a stranger, it could not be alleged, unless so gross as to shock the judgment. This is the ordinary case of an aged

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

agriculturalist withdrawing himself from active life, and placing his concerns in the hands of his children. It is calculated to excite no surprise—it is what thousands have done before. The whole income of the estate would not maintain the parents, if we add the expense of clothing and sickness.

It is said, that if the deed be void as to *William* it is so as to *Joseph*. This is grounded on the rule, that if it be void in part it is void in the whole. And we do not quarrel with the principle; because, taken in its full extent, it is a two edged sword, and is accompanied with the qualification, that if it be impossible to set aside a deed without doing as much injustice as justice, the Court will not interfere. But the principle does not apply, except the whole be acquired by fraud; as in *Huguenin v. Basely*, (14 *Ves.* 288) the case relied upon. There were third persons claiming through the fraudulent grantee. Nor does the rule apply when the good can be severed from the bad. One gives a bond, in the penalty of \$3000, conditioned to pay three persons \$500 each: because one of the \$500 happens to be for usury, shall it destroy the honest claims of the others, which rest on distinct grounds, and can be clearly ascertained and separated? It is the same of the present case, which is a deed to tenants in common—their interests are distinct—each may eject, give leases for their respective moieties, or distrain. Suppose a deed executed to a fair purchaser and his fraudulent attorney, conveying equal portions—would the Court set aside the whole, in order to punish the attorney? *William* never requested a deed for *Joseph*, as to whom there is not a pretence of influence, or even a request on his part.

In support of the third point, we refer to *Verplank v. Sterry*, (12 *John.* 559) and *Sterry v. Arden*, (1 *John. Ch. Rep.* 271.) The latter case was cited on the other side, as stopping with the position that a voluntary conveyance may be made good by marriage; but it does not deny the same effect as to deeds voidable on other grounds. We refer particularly to *Brown v. Carter*, (5 *Ves.* 862, 878.) There the son, tenant in tail, just as he came of age joined his father in charging the estate with £3000 for the use of the latter, and in re-settling it, taking back to himself only an estate

for life, remainder to his first and other sons, &c. and he married and acquiesced till the death of his father ; and though there was no probability of issue, it was held, that all equity in favour of setting the conveyance aside was gone by the marriage, &c. and the conveyance was holden good even as against creditors. The Court say they would have interfered, had the marriage been out of the question. The principle of that case is, that the Court will protect marital rights with the greatest jealousy ; and is the same which governed a case of dower, in *Oliver v. Richardson*, (9 Ves. 222.) A settlement procured by a fraud in which the wife was not concerned, will be protected. (*Barrow v. Barrow*, 2 Dick. 504.) The principle of the latter case also applies not only to the wife of *Joseph*, but to himself. Both were strangers to the pretended fraud ; and indeed were ignorant of the whole transaction.

ALBANY,  
April, 1824.  
Whelan  
v.  
Whelan.

Here was long acquiescence on the part of the appellant, with which the marriages are undoubtedly connected. The wives saw the sons in possession, claiming title, and the father acquiescing. *Murray v. Palmer*, (2 Sch. & Lef. 479) is relied on, to shew that this cannot be urged ; but that was a case where the acquiescence was in ignorance of the party's rights, and induced by fraud.

A conveyance entirely without consideration, if there be no fraud, cannot be set aside, except by creditors, unless for duress. (1 *Mad. Ch.* 216, 324.)

*A. Spencer*, in reply. Three years ago the appellant was comparatively a wealthy farmer ; and the bill seeks to set aside an act by which he is stripped of every thing, and thrown upon the charity of his neighbours. Against this, several formal objections have been made. Our bill is sometimes too large, and sometimes too small ; but the Court will not listen to such objections, unless forced upon them. They often refuse to hear a point not made in the Court below. But in the progress of the cause they will find no difficulty in reaching the merits. We rely that the bill charges positive fraud ; and this is established in three ways—1. By the answer : 2. By positive proof : and 3. By the intrinsic

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

sic nature of the transaction. We also rely, that the conveyances were executed under delusion and misapprehension, and that these were induced by misrepresentation or suppression of the truth.

As to the objection that our bill contains too much, we agree with the case of *Morris v. Burroughs*, cited from 1 *Atkyns*, 404, that the deeds cannot be avoided by subsequent circumstances, considered merely as such; yet they may be resorted to in order to shew *quo animo* the act was done, as you would look to an escape in a prosecution for felony. We use them here to shew an original design to deprive the appellant of subsistence. Indeed, the course has been acquiesced in by the respondents, who have not moved to strike out the matter for impertinence, and have even gone into proof upon that head. The fact, for instance, that *William* withheld the bond for the appellant's maintenance, is admitted in the answer, and *M<sup>r</sup> Call* gives evidence in relation to it. When required to pay the \$50, an order on *Charles* for the use of the farm which *William* held in trust, is offered, or payment is refused till the old bond and mortgage are given up, though known to be good for nothing. They mal-treat the mother, and drive her from the house, refusing to make provision for her, falsely pretending inability to support her away from home. And the answer, denying that they refused to pay *Wells* for her board, is directly contradicted.

Suppose the Court should think there is no charge of undue influence in the bill, the utmost they will do is to order it dismissed without costs. (*Beekman v. Frost*, 18 *John*. 544.) *Cui bono*, then, is the objection made? For the benefit of lawyers. I do not deny that the relief must be *secundum allegata et probata*; but nothing technical is necessary. Though a bill properly consist of nine heads, and a matter may more properly be charged in the stating part, yet this requisition is merely formal, and it may be set forth in any other part, or collected from the whole bill. Originally the bill was a mere petition, containing the substance of the case, which is yet sufficient, though a more formal way is found convenient and safe for the pleader. If enough appear on the whole bill to warrant the relief, it will be granted. The

party is not under the necessity of using the epithet to characterize the influence made use of. It is enough that he state facts, without christening them *undue influence*. If the bone and marrow be found in the bill, it is enough. Undue influence is a conclusion of law which need not be stated, especially in Equity, where the rules of pleading are most enlarged and liberal.

I proceed, then, as to both heads of fraud and undue influence ; for they are blended in the bill. The appellant's age, emigration from *Ireland*, his property, the domestic broils in which he was involved resulting in a partial dismemberment of his family ; the quarrels among his children in relation to the use and management of his estate, the desertion of his wife in the fall of 1820, her going to Mrs. *Shurtliff's*, the suit for her board, the summons, the agency of *William* in that affair, his return, representing the charge of \$5 per week for board, and the debt to *Campbell, William's* advice which is yielded to, going to *Reynold's*, having no intention to settle the estate, but induced by alarm and persuasion. These facts, charged in the bill and made out in proof, shew the appellant much in the power of the respondents. Great influence is inferrible, and which was exerted for a most pernicious purpose. The respondents were his sole reliance, and had the management of his property ; and had an overruling influence upon his mind. We admit and charge, that *William* was the only actor in the scene ; but it is singular that he should have kept the whole an entire secret, from *Joseph*, as he says in his answer. Both say they had the principal management of the appellant's affairs at the time ; both impute the strife in the family to disagreement between the appellant and his wife, the respondents being dutiful and attentive on their part. Both knew of the suit and service of the summons, and what took place on that occasion ; admitting that *William* went to *Shurtliff's*, denying that he had misled his father—companions throughout all these proceedings and acquainted with all, except the fact charged that *William* exerted his influence to procure an immediate conveyance—a very singular exception, at the least. *William*, in one breath, denies having charged his father and mother with dissipating the es-

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALRANY,  
April, 1824.

Whelan  
v.  
Whelan.

tate; and in the next he admits it. The father then throws himself upon his son's advice. And suppose he had said nothing to influence him—nothing charged in the bill—but stood by and heard his father make the strange resolutions which he formed upon the imaginary terrors by which he was surrounded. Indeed, all this is admitted by the answer; and it is admitting what is equivalent to the matter charged. It cannot be evaded by the pretence that it is not the same. I charge fraud by false dice. This is denied in the answer, and attributed to false cards. Shall this form a defence, or shall it be taken for the same, in substance? Seeing his father deluded and fearful, he seizes the favorable moment; he does not, indeed, he says, use the words charged; but, "to save the farm, you must, if you have any thing to give, give it now." This in the absence of all the family. "I tell you, that as you and mother are acting, you will soon have nothing to give." Surely he admits substantially the whole that is charged. The whole of his answer, so far as particulars are charged, is conceived in falsehood, and not to be believed, except where it makes for us. It admits that his father stated to *Reynolds* his difficulty and danger, adding (falsely according to *Reynolds'* evidence) that he at the same time declared his previous intention to give his estate to his sons; and he might as well convey it at that time as any other. Both admit that the debts to be paid were trifling, which is indeed inferrible from their not shewing what they amount to. They insist on the conveyance as an advancement; and then, by way of negative pregnant, deny that the *only moving cause* was fear of the estate being dissipated, wrought through *William's* representations. Does not this admit that it was part of the moving cause? Accusing the appellant and his wife with waste and impending ruin, and urging him to give then, or that he would abandon the appellant, is admitted by *William's* answer. This, in itself, was the creation of an alarm which he knew to be false and ill founded. There was no conduct calculated to produce ruin, or to excite the barbarous threat of desertion on the part of *William*. Sometimes the answer insists on the deed as having been executed for a valuable consid-

ALBANY,  
April, 1824.Whelan  
v.  
Whelan.

eration ; at others, upon a spirit of love, affection, and advancement so excessive as to give every thing away to such dutiful children. The parties hurry off to a stranger, the appellant laboring under the delusion that every body at *Johnstown* was combined to ruin him—a stranger who could know and suspect nothing of the fraud ; and call upon him to draw the papers. *William* stands by and hears the lunatic and unfounded representations of his father to *Reynolds*’, giving them countenance and sanction by his silence, and joining in the request. Every thing was sudden ; and it is fairly inferable that all was moved by *William*, who the day before had returned from *Albany* ; and who must have told his father what he related to *Reynolds*. How could his father acquire this knowledge through any other channel ? *William* was the confidential agent who managed the entire business. The father looked for information no where else. But be this as it may, the man who stands by, and takes advantage of an erroneous impression, knowing it to be such and omitting its correction, is as guilty as the one who excites it. Add, then, the evidence of *M<sup>r</sup> Naughton* and *Charles Whelan*, and a strong case of undue influence and fraud is established.

*Charles* is not so far interested as to disqualify him. His expectations are no more than that of any child. He expects a child’s portion. *Clary* mentions no other motive as being assigned by the appellant to *Reynolds*, than that of keeping his property away from his creditors and divesting himself of freehold. *William* answers as if the agreement to maintain his father was matter of previous arrangement ; but *Reynolds* says that the old man did not appear to expect any thing of that kind, till suggested by *William*, doubtless with a view to color the transaction. So perfectly confiding was the appellant, that he had not thought of indemnity ; and the answer of *William* is false in saying there was any agreement to that effect. Being false in so many particulars, this answer must be rejected in toto. It comes emphatically within the rule, *falsus in uno, falsus in omnibus*.

The facts bring these parties within the principle which required the whole of this business to have been done with

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

great deliberation, publicly, and under the advice of mutual friends. It is said we do not shew actual imbecility. This is not necessary. Here is a man 75 years of age. We have the authority of the constitution, that at 60 a man begins to go down hill ; and on this ground he is excluded from the superior benches of justice. The respondents should have rescued the appellant from the operation of this general rule, by shewing that he was an exception. Besides, credulity is a conformation of the mind as fatal as general imbecility. All the witnesses agree, that the appellant was very credulous and easy of persuasion to any purpose, especially by *William Cooper* is relied on, that general opinion as to his state of mind is not enough ; but it is so *prima facie*. Inquiry into particulars belonged to the other side, who should have pointed their interrogatories in such a manner as to shew the conclusions of the witnesses destitute of premises. Not having done this, the intendment is that they are well founded.

Fraud consists of any thing which deceives another ; cunning, device, trick, suppression of truth in any manner so as to cloud the mind. Several cases have been cited, of a class which arises from the relation of the parties, and consequent influence. Seeing this situation, the law throws its shield around the party. It is objected that these cases do not apply to the appellant, going merely against the abuse of parental authority. What, if so ? What do we read cases for ? For the sake of the rule which they establish, to be applied to other cases coming within the principle of those cited. In *Gibson v. Jeyes*, (6 Ves. 266) an attorney had sold an annuity to his client, to the disadvantage of the latter ; and on a bill filed to set it aside, on the ground of the relation which existed between the parties, *Ld. Eldon*, (p. 278,) after enumerating the very great precautions under which alone such a sale could stand, and declaring that if the party would mix the character of vendor with that of attorney, he shall be holden to manifest that he has given all that reasonable advice against himself that he would have given against a third person, proceeds : “ It is asked where this rule is to be found ? I answer in that great rule of the Court, that he



who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; *a rule applying to trustees, attornies, or any one else.*" Was the appellant dealing with one in whom he confided? He then comes within the principle of the case cited. It is not even necessary that we should shew the abuse. It is enough to shew the confidence. In the language of Ld. Eldon, (*id.* 278) that circumstance throws upon the one in whom confidence is placed the whole *onus* of the case. He must shew affirmatively that every thing was fair. In *Chesterfield v. Janssen*, (2 *Ves. Sen.* 155-6) Ld. Hardwicke enumerates four species of fraud. The 2d. he says, "may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make, on the one hand, and as no honest or fair man would accept, on the other; which are inequitable and unconscionable bargains; and of such even the common law has taken notice, for which, if it would not look a little ludicrous, might be cited 1 *Lev.* 3, *James v. Morgan.*" A 4th. species of fraud, which he mentions and comments upon at large, is one arising from an attempt to impose on third persons, and from the relation of the parties; and in the latter case he says fraud is matter of presumption to be rebutted by the other side. *Young v. Peachy*, (2 *Atk.* 258) goes fully to the same point. *Griffiths v. Robins*, (3 *Mad. Rep.* 191) will be found most strikingly analogous to the present, both in fact and principle. I invite the particular attention of the Court to that case; and especially to the language of the Vice Chancellor. The whole is directly applicable; and, if to be respected as authority, disposes of this cause. The case of *Gee v. Spencer*, (1 *Vern.* 32) is also directly applicable. There was a suit in Chancery touching a rectory owned by three sisters. The husband of one of whom, fearing to be in law, and made to believe that he should be forced to pay costs, released £1000, the arrears upon his share of the rectory, to the other two sisters who were to bear the charge of the suit. This release was set aside on the ground, *that a misapprehension*

ALBANY,  
April, 1824.Whelan  
v.  
Whelan

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

*in the party shall avoid his release.* This case is cited with approbation in 2 *Powell on Cont.* 202.

*Lewis v. Pead*, (1 *Ves.* 19) cited on the other side, was decided by *Buller*, J. sitting for the Lord Chancellor; and though a good common lawyer, he was not familiar with the principles of Equity. Taking his decision, however, as authority, it is no more than that the age of 75 does not, *per se*, evince inability.

I thank gentlemen for the case of *Middleton v. Kenyon*, (2 *Ves. Jun.* 391.) It contains all our premises, and all our conclusions, though the transaction was affirmed. What is that case? The elder *Middleton*, having encumbered his estate by his extravagance, in order to relieve himself by raising a very large sum, parted with certain interests in an estate to his son, in consideration of the latter contributing his own interest in the same estate, to relieve his father. The conveyance was to three trustees, of whom Lord *Kenyon* was one, and a defendant in Chancery. The ablest counsel were consulted, and the whole affair was conducted with ample time, and the greatest deliberation; but after the best possible arrangement, the father took it into his head that there had been misapprehension; and that, too, after long acquiescence, and large interests acquired, *bona fide*, by third persons, in the course of executing the trust. At page 408, the Lord Chancellor lays down the precise ground upon which we go, that any bargain may be declared null, and set aside upon grounds of undue practice or influence exerted, or on the ground of mistake.

The force of the different pretences set up by the respondents—sometimes that the deed was for natural love and affection, and sometimes for valuable consideration—is shewn and illustrated by *Clarkson v. Hanway*, (2 *P. Wms.* 203.) The consideration appearing on the face of the deed, is a pecuniary one of \$5000, the value probably which the respondents choose to fix on the bond and mortgage for maintenance, &c. and the case last cited shews that they cannot now press into their aid the consideration of natural love and affection, because it falsifies the deed. At least,

it strengthens the proof of fraud, by shewing that the deed carries a disguise.

As to the marriages, it is plain from the cases of *Sterry v. Arden*, (1 *John. Ch. Rep.* 261) and *Huguenin v. Basely*, (14 *Ves.* 273) that they cannot be taken into the account, provided there be fraud in the case, though a marriage may supply the mere want of a valuable consideration. But here there is no proof that the father ever heard of the intended marriages of the respondents, or that the wives ever heard of the conveyance; and no injurious consequences or disappointment to them can arise from setting aside the conveyance. The respondents already had farms, to the purchase of which the father contributed.

The facts do not warrant the inference that *Charles* is a necessary party. The proof of the trust is by parol; and it resulted to the grantor, who had the sole direction of it between *Charles* and his children. It was not limited to him specifically, but to him or his children, as the father might direct. No interest passed out of the father, and it was not such a trust as *Charles* could enforce in a Court of Equity. (*Steere v. Steere*, 5 *John. Ch. Rep.* 1.)

The declarations of the appellant, made to witnesses before the conveyance, that he intended his property for the respondents, were general, and might as well relate to a will as to a deed.

WOODWORTH, J. The bill seeks to be relieved against two conveyances executed by the appellant—the one for a farm in *Johnstown*, the other for 100 acres of land in the county of *St. Lawrence*.

Relief is claimed, on the ground of undue influence and fraud. The respondents object, that the former is not alleged in the bill, and consequently not in issue.

The bill charges the respondents with fraudulent artifices, management, and undue influence, in obtaining the deeds. It is, however, sufficient, if from an examination of the whole bill, the facts stated shew that the respondents necessarily had undue influence or control over the appellant, so that the parties did not treat on equal terms. The rule that

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Statement of  
the case.

Ground on  
which relief is  
sought.  
What the bill  
charges.

Undue influ-  
ence is in  
issue, if it  
appear, from  
the whole bill,  
to be charged.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

It is an inference from facts alleged and proved.

Leading features of the case,

requires every thing essential to the appellant's right to be alleged, is then satisfied. His equity will then appear, and the Court may administer the relief to which he is entitled. Whether undue influence has been used, is an inference from the facts alleged and proved, and does not require the averment of the pleader to put them in issue. It is enough if they authorize the Court to draw the conclusion.

I will briefly state some of the leading features of this case. The appellant is far advanced in years. He is probably not exempt from the infirmities incident to mind and body in the last stage of human life. In this second childhood, a surrender of business into other hands becomes indispensable. Something like a guardianship of the person and property is in most cases necessary. The appellant had reared a numerous family. For several years there appears to have been much family contention, arising from dissensions between his children, with respect to the use and management of his estate. The appellant's wife took part with some of the children. She and her husband lived unhappily, and separated. The bill alleges that the appellant had committed the management of his estate chiefly to his sons, *John, Joseph and William*; that after his wife left her home, the farm was in the exclusive possession of the appellant and the respondents. It is in proof that the appellant was very credulous, and easily persuaded by those whom he believed his friends; that he was easily led by *William*; that in the family strifes the appellant and the respondents were on one side—the wife and the other children in opposition; that the appellant could be persuaded to do any act dictated to him, when apprehensive that his property was in danger. It cannot be doubted that he was placed in a situation highly favourable to the views of the respondents. They had full opportunity for operating on his hopes and fears. A contract obtained from one party, so much in the power of the other, cannot be sanctioned, if confidence has been abused, if there is inadequacy of price, or the inference is plain, that advantage has been taken of age and imbecility, and the partiality of a parent has been artfully made use of to strip him of his property, and reduce him to a state of dependence and want.

Causes for avoiding a contract—abuse of confidence; inadequacy of price; advantage from age and imbecility; and the partiality of a parent.

## OF THE STATE OF NEW-YORK.

It does not appear that *Joseph* was an active agent in procuring the deeds. The transaction was between the appellant and *William*. The first question is, whether fraud or undue influence was practised by the latter.

The farm is valued at \$9000. The appellant's debts were trifling. His wife boarded with Mrs. *Shurtliff*. The bill alleges that she charged, as *William* stated, \$5 per week for his mother's board; that the appellant was sued by her in a Justice's Court; that *William* observed, if his mother was permitted to go on in that way she would involve the appellant in debt, and dissipate his whole estate; and that unless the appellant would immediately do something to prevent it, the respondents would leave him. That he asked the respondents what could be done. *William* advised the appellant to convey to him and his brother the whole estate real and personal. That to prevent such consequences he consented to the proposition.

The respondent *William*, in his answer, admits, that in *January*, 1821, he returned from *Albany* with the appellant, and found that Mrs. *Shurtliff* had commenced an action by summons. That the appellant asked him what should be done? That he then told the appellant, as he had often done before, that if the appellant had any thing to give him he wished to know it, otherwise he would abandon the farm; *that as the appellant and his wife were acting, they would soon have little enough for themselves*. That thereupon it was agreed that the appellant should execute a deed of the farm. The question here arises, what induced the appellant, *at this time*, to divest himself of all his property? The answer is obvious—his fears that his estate would be swept away for debts contracted by his wife.

It is scarcely necessary to say that the supposition was groundless. His wife had been at board 13 weeks. The demand was afterwards settled for \$25. A summons had issued to collect this small debt. This statement is enough to satisfy every mind that the appellant was bereft of ordinary understanding. If his ignorance and imbecility of mind were so great as to entertain such apprehensions, for such a cause, it is evident he would become an easy prey to any de-

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Appellant was induced to convey by unfounded fear that his property would be swept away by his wife's debts.

ALBANY,  
April, 1824.

Whelan

v.  
Whelan.

How treated by  
*William*, tho'  
he was bound  
to speak truly.

His conduct  
undutiful and  
fraudulent.

signing knave who happened to possess his confidence. How does *William* treat these suggestions? Every motive of duty towards a parent required him not to give a false coloring. He was bound not only to speak, but to speak truly. But such a course would not answer the purpose in view. He had too much discernment not to perceive that this was the favourable moment to profit by the appellant's fears. Instead of quieting the idle apprehensions of his father, he renews his request. "If you have any thing to give, I wish to know it, otherwise I will abandon the farm"—and adds, that as the appellant and his wife were acting, they would soon have little enough for themselves. The impression such remarks were calculated to make cannot be mistaken. It was, in substance, saying, "Your estate will be dissipated by the expense of supporting your wife, and the only way to avoid it is to give me your property." The allegation was untrue in point of fact. There was no ground for alarm. The conduct of *William*, on this occasion, was not only undutiful, but fraudulent. The appellant was thereby deceived, and became the dupe of the artifice practiced on him. The proceedings at Mr. *Reynolds*' office are in exact accordance with the view I have taken. *William* admits that the appellant stated to *Reynolds* he was apprehensive his wife would run him in debt; the merchants would trust her; that he understood he should be charged \$5 per week for her board; that he was determined to get rid of all his estate, so that he could not be kept in gaol but a short time.

The question here occurs, from whom did the appellant derive his information? *Reynolds* testified, that the appellant stated he had been prosecuted for the maintenance of his wife; that a recovery had been had against him; and he was fearful he should be harrassed with law suits, from time to time, for his wife's board and maintenance. He believed the above were among the inducements to convey his estate. *Clary* testified, that the appellant declared he made the conveyance for the purpose of saving it from his wife's creditors. *William* stands by, and does not attempt to remove these erroneous impressions. Had the business been fairly explained, I doubt not that Mr. *Reynolds* would have informed the appellant

there was no cause for alarm. The next day, when the bond and mortgage and bill of sale were executed, *M<sup>r</sup> Naughton* testifies, that the appellant declared it was a *hard case* for him to make an assignment of his property—it was done for the express purpose of preventing *Martha*, his wife, from spending his estate. Here also *William* is silent. He suffers his father to remain under the delusion. He perceives his unwillingness to reduce himself from affluence to dependence ; and yet quietly takes possession of the papers, and permits the fraud to be carried into effect. A strong confirmation of the fraudulent intentions of *William* is derived from his declarations to *Charles Whelan*, in 1823. “He had got the old man into the situation he wanted—that he had worked to get the appellant into that situation for these ten years.”

There is another fact that marks the influence of *William* over the appellant, as well as his incapacity to protect himself. *Mr. Reynolds* says, after the appellant had conveyed his property to the respondents, he appeared not to be prepared or anxious to exact a stipulation from them for the support of himself and wife, until the propriety of this had been suggested to him. At length a bond and mortgage were prepared, with condition to give the appellant and his wife a comfortable support, in sickness and in health, and the sum of \$50 annually, during life ; but that the respondents should not be required to provide such support, except in their own dwelling-houses, which they or one of them should occupy. As the appellant seemed not to have thought of any consideration to be paid, nor anxious to require any, he was of course willing to accept any thing *William* would give. The spectre, of law suits, his wife's debts, and imprisonment, had so haunted his imagination, that his own future support seems to have been lost sight of ; or, if not, he reposed on the filial affection of his favourite sons. The consideration, then, was grossly inadequate, and not suited to the exigency of the case. It may well be considered as one item that gives the character of fraud to this transaction. There is no ground for upholding this deed on the principle that this was an advancement, or that it was founded on natural love

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Consideration  
inadequate.

Conveyance  
cannot be up-  
held as an ad-  
vancement.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Principles on  
which equi-  
ty will re-  
lieve.

One making  
a representa-  
tion to another,  
dealing on the  
faith of it shall  
make it good.

One bar-  
gaining with  
another, plac-  
ing confidence  
in him, must  
show a reason-  
able use made  
of that confi-  
dence.

One falsely  
supposing his  
estate in dan-  
ger conveys it  
to sons for that  
cause, the lat-  
ter knowing  
the supposi-  
tion to be  
groundless and  
neglecting to  
correct the  
mistake; this  
should avoid  
the convey-  
ance.

and affection. All the declarations of the appellant of his intentions respecting the respondents, must be considered as relating to his future bounty. They can have no effect in supporting the present deed.

The principles which govern a Court of Equity, abundantly prove that the appellant is entitled to relief. In *Evans v. Bicknell*, (6 Ves. 182) the Chancellor observed, it is a very old head of Equity, that if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knows it to be false. So also in *Gibson v. Jeyes*, (6 Ves. 278) it is laid down as a general rule in Equity, that he who bargains in matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else. We cannot shut our eyes to the fact that *William* well knew, that the appellant's large real estate was not in danger of being wasted, by the inconsiderable expense of paying his mother's board in the country, and supplying her wants for a few years; she then being nearly seventy years of age, and in delicate health. The supposition would be puerile, and inconsistent with the intelligence and management discovered by *William*, in effecting his object. The appellant, in great distress, makes inquiry what is to be done? He seems to be entirely ignorant, that his estate and person were not in danger. *William* had the power to make known to him his true situation, but he withholds the information. It would therefore be unconscionable to hold the appellant to the bargain; this concealment is alone a sufficient ground for avoiding it. When transactions of this kind are between parties standing in such relations to each other, they ought to be conducted with all imaginable fairness. In *Bowles v. Stewart*, (1 Sch. & Lef. 209) it was held, that concealment of a material fact was sufficient to avoid a release obtained by the person whose duty it was to make the disclosure. I fully subscribe to the reasoning of Sir Samuel Romilly in *Huguenin v. Basely*, as applicable to this part of the case; that "if the Court sees that any arts or stratagems, or any



undue means have been used ; if it sees the least speck of imposition at the bottom ; if there be the least *scintilla* of fraud, this Court will, and ought to interpose ; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample and uninfluenced enjoyment of it."

From this examination, it seems to me, there is little difficulty in deciding that the respondent *William* procured the deed from the appellant to the respondents by fraud and imposition ; and that so far as he is concerned, it ought to be held utterly null and void.

The next question is whether the fraud of *William* in procuring the deed, renders it void as to *Joseph*, the other respondent. It is a general rule, that in ordinary cases of fraud, Equity undoes the whole transaction, and replaces the parties in their former situation. (*Daubney v. Cockburn*, 1 Mer. 644.)

The case of *Bennet v. Wade*, (1 *Dickens*, 84) is very much in point. The facts were briefly these : Sir *John Leigh* was seized of a large real estate ; his mind was so weak, that he was easy to be imposed upon ; the defendant was a surgeon and apothecary, who attended him, took advantage of this weakness, and prevailed on him, then aged sixty, to marry *Wade's* daughter, aged sixteen, and to execute a settlement in favor of his daughter. The daughter dying soon after, *Wade* obtained a will from Sir *John* in his favor, and also indentures of lease and release as he alleged in consideration of the will. After the testator's death, *Wade* set up the deeds, under which the defendants claimed beneficially, and they entered on the estates. A part of the estate was conveyed to *Wade* in fees ; a bill was filed to set aside the deeds, and a cross bill to establish them. It was argued on the part of the plaintiffs, that whatever fraud or imposition had been practised on Sir *John Leigh*, by the defendant *Wade*, they were not privy to, or concerned in it ; that it would be hard to involve the innocent with the guilty, and punish them, by setting aside the deeds in toto. But *Ld. Hardwicke* was of

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

*William* procured deed by fraud, and it should be set aside as to him.

Whether his fraud avoids it as to *Joseph*.

In ordinary cases of fraud, equity undoes the whole transaction.

Cases to this point.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

opinion, that the deeds were founded in fraud, and being so, it vitiated the whole; that they were obtained from Sir *John Leigh*, by fraud, imposition and circumvention, by means of the undue influence of the defendant *Wade* over his weakness; and that the same ought to be set aside. This case fully establishes the principle, that the respondent *Joseph* cannot be protected. So, also, in *Davidson v. Russell*, (2 *Dickens*, 761) the question was, whether a deed could be set aside in part for fraud, and the rest established. *Ld. Thurlow* was decidedly of opinion it could not. He directed the contract to be set aside, and observed, there could be no hesitation; though it appeared that innocent persons were interested under it. This cause was afterwards reheard and affirmed by *Ld. Loughborough*, in 1794.

In *Huguenin v. Basely*, (14 *Ves. Jun.* 289) the same doctrine is recognized. *Ld Eldon* observes, "I should regret that any doubt could be entertained, whether it is not competent to a Court of Equity to take away from third persons the benefits which they have derived from the fraud, imposition or undue influence of others." The case of *Bridgeman v. Green*, (2 *Ves.* 627) was considered by his Lordship as an express authority that it is within the reach of the principle of this Court, to declare that interests so gained by third persons cannot possibly be held by them. This last cause afterwards came before the Lords Commissioners, and Lord Chief Justice *Wilmot* expresses himself thus: "There is no pretence that *Green's* brother or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No. Whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." (*Wilm.* 64. 14 *Ves.* 289.)

It is unnecessary to pursue this doctrine through all the cases, to be found in the books. It is believed that the rule is

firmly established. If it were otherwise ; that a person could evade the principle, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. The deed, then, is bad *in toto*, and must be set aside as to both the respondents.

ALBANY,  
April, 1834.

Whelan  
v.  
Whelan.

But it is contended, that in as much as the respondents were unmarried at the time the estate was conveyed, and afterwards married, and the appellant declared to the friends and connexions of their wives that the respondents were the owners of the estate, it would be against public policy and contrary to equity and good conscience, to permit him now to avoid that conveyance.

Whether the marriage of respondents should affect the question.

The evidence of *Thomas Goff* is, that in 1820 the appellant stated that he intended to convey all his property in *Johnstown* to the respondents. *Catharine Goff* testified, that the appellant said he had conveyed or intended to convey his farm. But there is no testimony that any declarations were ever made to the respondents' wives, before their marriage ; nor does it appear that the conveyance made by the appellant was among the inducements to the marriage. Indeed, it does not appear that they had any previous information or knowledge respecting the transaction between the appellant and the respondents.

No evidence that marriage was induced by conveyance ;

The facts, then, do not present the question raised by the counsel, or form any objection to the interference of the Court. Marriage is a valuable consideration ; and if the grantee of a voluntary deed gains credit by the conveyance, and a person is induced to marry on account of the provisions made in the deed, the conveyance, on the marriage, ceases to be voluntary. This principle was decided in *Sterry & wife v. Arden & others*, (12 John. 536.)

Therefore, it can have no influence.

Marriage is a valuable consideration.

A voluntary deed ceases to be so, if a marriage be induced by its provisions.

In the case of *Barrow v. Barrow*, (2 Dickens, 504) cited by the respondents' counsel, it was held that a settlement in consideration of marriage, procured by fraud and imposition in which the wife was not concerned, should not be set aside. In that case, the daughter of the person who practised the fraud revolted at first, but was prevailed on to marry the person who made the settlement, although his intellects

Case of a fraudulent settlement made good by marriage.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court.

*Charles* not a necessary party, for he could not enforce the execution of the trust.

A trust must be manifested and proved by writing.

were quite impaired, and he in a state of childhood. The Court refused to interfere, on the ground that there was a valuable consideration proceeding from the party not privy to the fraud.

The remaining inquiry, is whether *Charles Whelan* is a necessary party, in consequence of the deed given by the appellant to *William* in trust for *Charles*. All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the Court. The question here, is whether *Charles Whelan*, could enforce the execution of the trust. If he could not, he is not a necessary party. The farm in *St. Lawrence* county, on the face of the agreement was conveyed unconditionally to *William*. He admits in his answer, that he agreed to convey it to *Charles*, as the appellant should direct. There was no declaration or evidence of trust in writing, and the deed is absolute. This case cannot be taken out of the statute of frauds. A trust need not be created by writing, but it must be manifested and proved by writing. The nature of the trust, and the terms and conditions of it, must sufficiently appear; so that the Court may not be called on to execute the trust, in a manner different from that intended. (*Steere v. Steere*, 5 *John. Ch.* 12. 3 *Ves. Jun.* 696, *Foster v. Hale*.) It follows then, that *Charles Whelan* could not compel the execution of the trust. The deed for the *St. Lawrence* farm, rests on the same foundation as the conveyance to the respondents jointly. I am of opinion, that the decree of his Honor the Chancellor be reversed; and that a decree be entered, declaring, that the deed from the appellant to the respondents for the farm in *Johnstown*, and the deed to *William Whelan* for the *St. Lawrence* farm, be annulled and held for nought, and that the appellant recover against the respondents his costs in the Court below, to be taxed.

SAVAGE, Ch. J. BOWMAN, BOWNE, BURROWS, BURT, CLARK, CRAMER, EARLL, GARDINER, GREEN, HAIGHT, KEYES, MALLORY, M'CALL, M'INTYRE, MORGAN, NELSON, STRANAHAN, THORN and WHEELER, Senators, concurred.

SUDAM, Senator, went into a very full examination of the pleadings. He said the points for the consideration of the the Court are—

ALBANY,  
April, 1824.

Whelan

v.  
Whelan.

Points.

1. Whether the conveyance of the 19th January, 1821, was fraudulent and void, by reason of *William's* false representations; or by his suppression of the truth when he was bound to speak.

2. If not, was the appellant so much under the influence of the respondents, or either of them, that the conveyance was not the execution of a free, unbiassed purpose of bounty?

3. Whether the Court can compel a re-conveyance of the *St. Lawrence* farm; *Charles Whelan* not being a party to the bill.

Upon the first point he went at large into the facts connected with and immediately preceding the conveyance, as those upon which the opinion of the Court must rest. The subsequent transactions, he said, may be regarded as circumstances, but not of primary importance, in the decision of the cause. They may aid in the conclusion, but cannot be the basis of our judgment. The *Johnstown* farm was worth at least \$8000, and the personal property there amounted to about \$400; but there is no evidence as to the value of the *St. Lawrence* farm, or the personal property upon it. The respondent was 74 years of age, and his wife about 67, at the time of the conveyance. According to the admissions of the answers, he had, some time previous to the spring of 1819, resigned the charge of his real estate at *Johnstown* to his sons, *John*, *Joseph* and *William*; the reason of which, as stated by *William*, was to make them men of business; though *Joseph* says he did not know the reason. How long they had occupied the farm does not appear. In 1819, *Carr*, the appellant's son-in-law, came into possession, and occupied it till the fall of 1820; when all the children then at home, except the respondents, removed to *Indiana*, leaving the respondents in full possession, with the appellant. About the same time, *Mariha*, the appellant's wife, left the house, and took lodgings with Mrs. *Shurtliff*. The respondents admit there had been dissension in the family, but

Evidence as to  
fraud.

ALBANY,  
April, 1824.

Whelan

v.

Whelan.

deny, in the first part of their answer, that it arose from disagreement as to the management of the farm. In *June*, 1820, the appellant had, of his own motion, executed a deed of the farm in question to *Joseph* and *William*, taking a bond and mortgage from *William* alone, for \$3000. These papers were drawn at *Johnstown*, and the transaction was known to *Joseph*. In *September* following, *William* being dangerously ill, this was rescinded, on the mere request of the father, the respondents releasing to him all their right; the appellant thus becoming re-seized of the farm about the time his wife and children left him. Cut off from all communication with the rest of his family, the appellant continued to reside with *Joseph* and *William* till *January*, 1821; when, on the latter returning from *Albany*, they found the copy of the summons from *Mrs. Shurtliff*. In relation to this, *William* admits that his father asked him what was to be done; to which he replied, *and had often told him before*, that if he had any thing to give him he wished to know it, otherwise he would *abandon the place*—that as the appellant and his wife were acting, *they would soon have little enough for themselves*. That it was then agreed, as the father had long intended, to execute the conveyance and bill of sale. On the 19th, *William* and his father, with *John Clary*, who appears to have been a mutual friend, went to the office of *Mr. Reynolds*, an attorney and counsellor at law, an entire stranger, 10 miles distant, for the purpose of having the proper conveyances drawn. *William's* answer, as to what passed there, concurs, in the main, with the evidence of *Mr. Reynolds* as to the cause of the conveyance. That it was owing to fear of the wife's extravagance, and the consequent law suits. But *Reynolds* omits the declaration of the father, set up in the answer, that he had intended the farm for his sons, and might as well give it to them to-day as to-morrow; and his mentioning the consideration he was to receive. So far from this, he appeared not to be prepared or anxious to exact any stipulation from the respondents, for his and his wife's maintenance, till the propriety of this had been suggested to him; and then he and *William* agreed on the bond and mortgage.

This is the evidence of a person wholly disconnected with the parties, swearing in direct contradiction to *William*, as to any *moving cause* beyond the fears of the father. If the conveyance was the mere consummation of a prior intent, why did the appellant divest himself of all his real estate, including that in *St. Lawrence*? And where is the force of the other motive assigned by *William*, that the appellant wished to divest himself of all freehold, to evade imprisonment for debt; when the respondents both admit that they were to pay all subsisting debts, and were to prevent future ones by maintaining both the appellant and his wife? It is clear that the appellant acted under erroneous impressions in regard to his legal liability; that his object was not to advance any of his children, or settle his estate. But he conveyed because he believed, from information, that it was necessary to prevent his estate being squandered by his wife, and to ensure only a temporary imprisonment for debts contracted by her. *John Clary's* testimony goes distinctly to these two causes. True, according to his testimony, the appellant protested to God, that a child belonging to him should not have one cent, except the respondents; for *the others had robbed him of all he had, and had not left him a chair to sit on*. This declaration is made at the very moment when he is conveying a valuable estate in *Johnstown*, and a farm in *St. Lawrence*, with the personal property there, for the use of his son *Charles*. If this evidence proves any thing, it is, that the appellant was influenced by considerations different from those set up by the respondents; and, indeed, that he knew not what he said, or what he did. His declarations were directly at variance with the truth and with his acts. He declared that he could not trust the people of *Johnstown*; which was the reason of his applying to *Mr. Reynolds*. *Clary* was also present when the bill of sale was executed, and he states that the reasons for this were the same as for conveying the real estate. This comes from a witness produced by the respondents. *M<sup>r</sup> Naughton* was also present with all the parties, and witnessed the bill of sale and bond and mortgage; and the appellant complained that his case was a hard one; that

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

the whole was done for the express purpose of preventing his wife from spending the estate.

Was here, then, misrepresentation by *William*, or a studied silence on the part of the respondents when they ought to have spoken, which led to and confirmed the opinion of their father in the fancied danger to his estate? Had *William* before said any thing to strengthen that opinion? Upon a careful and laborious analysis of the evidence, I am of opinion that the appellant's case has been made out, on this point. The sole management of the appellant's affairs was in the hands of his sons. Aged, weak, credulous and solitary, he looked to them for advice. Deserted by the rest of his family, whom he abhorred for fancied injuries, and to whom he believed he could never be reconciled, he was left dependent upon these two sons. To the feuds and distractions of his family, was added the pursuit of his property by legal process. He goes for advice and consolation to *William*, the most favoured of his two remaining children, and the one in whom he particularly confided. And who but *William*, under such circumstances, would have added poignancy to a father's wretchedness by a threat of desertion mingled with harsh reproof, and by advice which was immediately followed by a conveyance of his estate? The facts which the appellant stated as the cause of the alarm which led to the conveyance, must have been derived from one or both of the respondents. At any rate, his fears were countenanced by them both. Both were present when the bill of sale and mortgage were executed, and both then heard the true cause assigned by the appellant. As his children and confidential agents, they were bound in duty to set him right, and to see that he did not act upon such motives. In my opinion, here was palpable delusion and fraud; and the deed should be set aside for that reason.

The evidence  
shews fraud,  
and deed  
should be set  
aside for that  
reason.

How far  
*Charles Whe-*  
*lan* is to be cre-  
dited.

I have arrived at this conclusion, independent of *Charles Whelan's* evidence. Though I think him competent, the prospect he has of a portion of his father's property, and his stating a conversation between him and *William* alone, undoubtedly go to his credit; yet he is so entirely supported by the other facts, I think him entitled to much credit. And



if he is to be believed, the case presents positive proof of a pre-concerted fraud, compassed by the labour of years.

2. But there is another point in the cause well worthy of consideration. It is that the respondents had an undue influence over the appellant, to such an extent as to preclude our saying that he conveyed the farm and personal property at *Johnstown* as a free, unbiassed act of bounty.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

2d point.

The counsel for the respondents meet this point, firstly by saying that it is not made a substantive allegation in the bill; and if this be so, it cannot be available here. The bill charges, that the appellant was led to convey by the false representations and persuasions of the respondents that his wife was spending the whole estate—that he conveyed not for the purpose of making a settlement or disposition of his estate, but for the purpose of removing it out of her reach—and that there was no other moving cause for the conveyance than the persuasion and representation of the respondents that such a step was absolutely necessary to prevent the estate being dissipated by the mother. The bill also states the dissensions in the family, with their cause, and the manner in which the appellant lived with the respondents. The parties have gone on to examine witnesses to the point of undue influence, and I think properly; for, in my opinion, it is substantially involved and sufficiently stated in the bill, though not named undue influence, in terms.

Whether undue influence is put in issue.

Charging it substantially, without calling it undue influence, is enough.

I have already adverted generally to the situation of the property and the family, their dissensions and ultimate dispersion, and the age of the appellant and his wife, the latter of whom was in delicate health for several years, of an irritable and peevish disposition, and had taken part with several of the children, against their father, in the dissensions of the family, which arose relative to the use and enjoyment of the real estate at *Johnstown*. The answers admit, that previous to the lease of 1819, under which Carr possessed the farm, *John, William and Joseph* had the management of it, and that during this lease, the appellant and respondents resided in a log house, on the same farm, while the wife resided with Carr, at the homestead. The answers admit the previ-

Evidence of undue influence.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

The case is brought within the principle of those authorities which disallow a contract between persons standing in certain confidential relations to each other.

ous agency and management of the estate, the separation of the family during the lease, and its dispersion after the lease had expired; virtually saying that the appellant was under the keeping of the respondents, and residing with them for some years previous to the transaction in question. It is abundantly in proof, that the appellant was a credulous man, and easily led, especially by *William*, who, with *Joseph*, uniformly took sides with his father, in the dissensions of the family, against its other members. Taking into account the age of the appellant, the double relations of parent and child and principal and agent, the general credulity of the appellant, and the ease with which he might be led by *William*, connected with the circumstances attending the conveyance, and the case is brought most emphatically within the principle of those cases cited by the counsel for the appellant which forbid a contract between persons holding certain relations to each other, which imply, from their nature, an influence and confidence too great to be trusted in the hands of one who may wield them to his own advantage. It was, indeed, truly said at the bar, that no case had been shown in which a conveyance from a parent to one of his children had been set aside for these or the like causes; but that relief had been refused in such cases. These refusals were in cases of English family settlements, where provisions were made for children, which the Court adjudged to be reasonable in reference to the estate of the party making the settlement. No case can be cited, in which an aged man, under the custody and influence of one of his relations, disposed of his whole estate to such relation in exclusion of others having equal natural claims upon his bounty, where a Court of Equity would not look into the transaction with an eagle eye. Besides, the English decisions are doubtless influenced by their law recognizing the rights of primogeniture and entailment. In this country these rights are unknown. But it is not sought here to avoid the deed, because the whole property is given to the respondents. That the appellant clearly had a right to do, if he chose. But the objection is, that when he made this conveyance he was, and had been for some time, so much under the influence of the respondents, that he would take their

suggestions as his rule of conduct; so that the conveyance was not his act but theirs—it was not the result of his own free will, but an act done under the pressure of circumstances, aided by the suggestions or advice of the respondents. At any rate, they made no attempt to correct the erroneous impressions under which the appellant laboured, though they were acting as his agents in relation to his real and personal estate, and indeed were bound to this by other powerful considerations of duty. They have, in a word, betrayed the trust and confidence reposed in them, and made a profit of their treachery. This view of the case is, I think, fully supported by the answers and evidence. It is also a remarkable circumstance, that this conveyance was only about 4 months after the re-conveyance to him of this very property, by *William*, of whom he had before taken a bond and mortgage of \$3000. The first conveyance, it seems, was for fear of a judgment, and the property was, on the appellant's request, surrendered by the respondents. According to their account, they received the first deed without inquiry, *William* alone gave the mortgage, and the whole property was readily surrendered. Would these things have taken place, if, as pretended, it had been the long and settled purpose of the appellant to convey by way of advancement? The truth seems to be, that he had surrendered himself as well as his estate, to the charge of the respondents. His age, his education, his infirmities, and his passions, all combined to make him a fit subject to be operated upon by trifling causes. He had no benefit from the advice of counsel, or of any one except *Clary*, who was also the friend of the respondents. From these considerations, followed by the hurried, secret and suspicious manner in which the business was transacted, I feel constrained to say, that if there ever was a case in which a Court of Equity ought to avoid a deed for undue influence, this is one.

3. *William* having submitted, in his answer, to re-convey the *St. Lawrence* farm, and there being no written declaration of trust, I can see no reason why we should not adjudge a re-conveyance. On a bill filed by *Charles*, or his children, *William* might set up the statute of frauds, and de-

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

Deed void for  
undue influ-  
ence.

*Charles Whe-  
lan* not a ne-  
cessary party.

ALBANY,  
April, 1824.

Whelan  
v.  
Whelan.

feat a conveyance ; and he admits that this farm was given to him in trust for such purposes as the appellant should direct.

Though *Joseph* appears only to have assented to the act of *William*, yet I think the deed is void as to both.

I am, therefore, of opinion, that the decree of his Honor the Chancellor should be reversed ; and that a re-conveyance of the two farms should be decreed.

For reversal,  
23—for affirm-  
ance, 7.

BRONSON, DUDLEY, LYNDE, REDFIELD, WARD, WOOSTER and WRIGHT, Senators, dissented.

A majority of the Court being for a reversal, the following order was thereupon entered :

“ It is ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery, appealed from, be and the same is hereby reversed. And it is further ORDERED, ADJUDGED and DECREED, that the deed and conveyance executed by the appellant to the respondents, on the 19th day of *January*, 1821, and in the pleadings in this cause mentioned, whereby the appellant conveyed to the respondents, in fee, a certain farm of land in the town of *Johnstown*, in the county of *Montgomery*—and also another deed and conveyance executed by the appellant to the respondent *William Whelan*, on the day and year last aforesaid, and also in the said pleadings mentioned, and whereby the appellant conveyed to the said *William Whelan*, one of the respondents, in fee, a farm of land in the county of *St. Lawrence*—and also a bill of sale of certain personal property, executed by the appellant to the respondents, and also in the said pleadings mentioned—are, and the same are hereby declared to be, respectively, fraudulent, null and void. And it is further ORDERED, ADJUDGED and DECREED, that the respondents forthwith deliver up to the appellant the said several and respective deeds, to be cancelled ; and that the respondents, also, by a competent deed of conveyance for that purpose, release and convey to the appellant, in fee, all their right, title and interest, of, in, and to the said farm of land in the said town of *Johnstown*, in the said pleadings mentioned, with proper and

apt covenants against their own acts and transactions, since the said 19th day of *January*, 1821, whereby the title to the said farm may be impaired, or in any wise encumbered. And it is further ORDERED, ADJUDGED and DECREED, that the respondent *William Whelan*, in like manner, release and convey to the appellant, in fee, all his right, title and interest, of, in, and to the said farm in the county of *St. Lawrence*, in the said pleadings mentioned, with like covenants; the said deeds to be settled by a Master of the Court of Chancery, if the parties disagree respecting the same. And it is further ORDERED, ADJUDGED and DECREED, that it be referred to a Master, to take and state an account of the value of the annual rent of the said farm in *Johnstown*, from the said 19th day of *January*, 1821; in which account the respondents shall be debited the value of the said rents from the said time until the taking of such account, if the respondents shall then be in possession of the said farm; but if they shall have yielded up the possession thereof to the appellant, then to the time of so yielding up the same; and the respondents shall be credited for the board, maintenance, support and clothing of the appellant and his wife, during the time they or either of them were maintained and supported by the respondents, since the said 19th day of *January*, 1821; and the respondents shall also be credited for any moneys paid to or advanced for the said appellant, since the day and year last aforesaid; and, also, that the respondents be credited the balance of any permanent and beneficial improvements made on the said farm in *Johnstown*, since the said 19th day of *January*, 1821. And the said Master shall also take and state an account of the value of the goods and personal property conveyed by the said bill of sale, by the appellant to the respondents, and which have been sold, disposed of, or appropriated to the use of the respondents, and which shall not be delivered up by the respondents to the appellant before the taking of such account. And it is further ORDERED, ADJUDGED and DECREED, that the appellant shall deliver up to the respondents to be cancelled, the bond and mortgage given by them to the appellant to secure the maintenance of the appellant and his wife, and mentioned in the pleadings

ALBANY,  
April, 1824.

---

Whelan  
v.  
Whelan.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

in this cause. And it is further ORDERED, ADJUDGED and DECREED, that the appellant recover of the respondents his costs to be taxed in the prosecution of this suit in the Court of Chancery, and that this cause be remitted to the Court of Chancery, to the end that this decree may be carried into execution."

---

RICHARD UDALL, impleaded with EDWARD M. L. KENNEY,  
appellant,  
against  
ELIZA S. KENNEY, respondent.

The wife's equity, as it is called, cannot be disposed of by the husband, without first making a suitable provision for her support.

Though the wife should join the husband in the assignment of it, this will not render the disposition valid, she being an infant.

The only way in which she can herself dispose of it, is by consent in court, or out of court, on an adequate provision being made for her :

Otherwise as to a wife's choses in possession, or in action. Of the former the husband is absolute owner by the marriage ; and so of the latter, when reduced into his possession.

It seems, that when the property of the wife is the subject of an action at law, equity will not interfere, by injunction or otherwise, so as to prevent the husband getting possession till he make proper provision for his wife.

But if the aid of a court of equity be necessary to enable the husband to get possession of his wife's property, the court will see, when he comes there for that purpose, that he first make a suitable provision for her ; or it will interfere, at her suit, to prevent his getting possession, in any way, till such provision is made.

So of the general assignee of the husband, by his own act, with or without valuable consideration, or by operation of law.

So of a specific assignee for valuable consideration, with or without notice of the wife's equitable claim.

Cases on the three last heads considered in chronological order, by SAVAGE, Ch. J.

In all these cases, the extent of the provision for the wife is properly the subject of reference to a master, and must depend on circumstances ; and the husband, or his assignee, is entitled to what remains after provision made.

The general rule is, that the interest or income of the wife's equitable property, may be received by the husband, while he lives with and maintains her.

But if he neglects to do this ; or if he ran away with and married her while she was a ward of the court ; or has shewn incapacity to manage his concerns, or a disposition to squander his wife's property, the court will direct the interest to be paid to her, or to a trustee for her benefit.

While, however, he has a right to receive the interest or income of his wife's property, he may transfer that right to another for valuable consideration, who shall not be holden to account to the wife, especially if such right of the husband or assignee be sanctioned by an order of court.

It seems, that inadequacy of price, alone, is not a sufficient ground for setting a contract aside.

Bank stock was settled by a father, by deed declaring a trust in favour of his infant daughter, and by an order of the court of chancery was placed in the hands of the assistant register of that court, as trustee to execute the trust in her favour. She married, and an order of the court was made to pay the dividends of the stock to the husband. Within a year after the marriage, and while she was an infant, she and her husband transferred the stock for a valuable consideration, the assignee knowing at the same time of the deed of settlement and the infancy of the wife ; whereupon an order was made, that the dividends should thereafter be paid to the assignee till the wife came of age, or the further order of the court. On a bill filed, by the wife, against the husband and assignee, the court of chancery declared the assignment null and void, so far as it respected the wife's equity ; and decreed that the assignee should account for the dividends received by him under the order. And, the husband having misbehaved himself, the dividends were directed to be paid to the wife, until she came of age, with liberty for her then to apply for such suitable provision, out of the property, as might be determined on the usual reference to a master. On appeal to the court of errors, the decree was affirmed, except so much as directed the assignee to account for dividends received anterior to the decree ; and the wife in the mean time having come of age, the record was remitted with directions to the court below to make the proper reference, and determine what would be a suitable provision ; the overplus, if any, to be paid to the assignee. And the chief justice intimated, in delivering the opinion of the court, that if the wife had no fortune beside the stock, which was \$8000, the whole would not exceed a reasonable provision.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

**APPEAL** from the Court of Chancery. The pleadings and proofs with the decree, and the late Chancellor's reasons in its support, are stated in the report of the same case, as it stood in the Court below, under title of *E. S. Kenney v. Udall & Kenney*, (5 *John. Ch. Rep.* 464.) All the facts material to the view taken of the case here, will be found in the opinion of SAVAGE, Chief Justice, who delivered the opinion of this Court.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

*J. V. Henry*, for the appellant, premised, that under the impression of duty which the Chancellor felt to protect this young married woman, he had gone very great lengths; and had cut down every thing, even *his own order* for the payment of the dividends. He contended that the case of *The Earl of Salisbury v. Newton*, (1 *Eden's Rep.* 370,) cited by the Chancellor, was distinguishable from the present. Notwithstanding *Like v. Beresford*, (3 *Ves.* 506,) which he considers as settling the question of the wife's right to her equity against a particular assignee, for valuable consideration, he admits that it was a litigated point in *Wright v. Morley*, (11 *Ves.* 12.) In *Jewson v. Moulson*, (2 *Atk.* 417,) the wife had never been in the receipt of the fund. The cases cited by the Chancellor of a claim to the wife's equity by the assignees of a bankrupt husband, will of course not be relied on, as they go upon the ground that the assignment is general, and by operation of law. *Beresford v. Hobson*, (1 *Madd. Ch. Rep.* 262) goes farther for the wife than any other case; but even there she did not get the whole; whereas all is here declared void by the Chancellor, in the face both of the assignment and his own order.

That this assignment cannot be rescinded for inadequacy of price, or as a fraudulent, or unconscionable bargain, he cited *Newland on Contracts*, 357-8, and 360-5; *Franklin v. Osgood*, 14 *John.* 559, *per Platt, J.*; 1 *Fonbl. B.* 1, ch. 2, s. 9; 1 *Mad. Ch.* 98.

He then stated the following points; and cited and commented upon the authorities which follow them respectively:

1. That the stock in question was a vested interest in the wife, subject to the limitation over on the contingency of her dying without issue before 21. And the husband having, at law, an absolute right to all the wife's personal estate in possession, and a qualified right to her choses in action, had therefore power to dispose of the stock. (1 *Report on Legacies*, 182, 183, 184, 203. *Lumb v. Milnes*, 5 *Ves.* 517, 519. *Com. Dig. Baron and Feme*, (E. 3.) *Sir Edward Turner's case*, 1 *Vern.* 7. *Pitt v. Hunt*, *id.* 18. *Tudor v. Samyne*, 2 *Vern.* 270. *Duke of Chandos v. Tal-*



bot, 2 P. Wms. 608. *Lord Carteret v. Paschal*, 3 P. Wms. 199. *Bates v. Dandy*, 2 Atk. 207. *Jewson v. Moulson*, id. 417. *Hawkyns v. Obin*, id. 549. *Grey v. Kentish*, 1 Atk. 280. *Countess of Strathmore v. Bowes*, 1 Ves. Jun. 28.)

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

2. Such disposition being made by the husband, the wife cannot be admitted to impeach it, on the ground that it was unfairly or improperly obtained. That right belongs to the husband only, or those claiming under him; and as he does not seek to do this, nor even unite with his wife as complainant in the cause, the Court ought not to interfere to set it aside.

3. The Court does not interfere with the legal rights of the husband, but will suffer him, if he can without its aid, to obtain at law the possession of her estate. The stock in question was legal property.

An action would have lain against the husband for its value, had he refused to complete the transfer. (*Matter of Morris v. The Mechanic's Bank*, 10 John. 484-5. *The King v. The Bank of England*, Doug. 523.)

4. The objection that the wife is a ward of the Court, is unfounded; the wardship having ceased on her marriage; and the Court below having even acted on that principle, by directing the dividends to be paid to Kenney in his character of husband. (*Mendes v. Mendes*, 1 Ves. Sen. 89, 91, per Lord Hardwicke, C.)

5. That even if the stock was equitable property, yet a specific assignment of it, by contract, for a valuable consideration is valid, and not subject to an equity of the wife, for a provision. (*Sir Edward Turner's case*, 1 Vern. 7. 1 Eq. Abr. 58, pl. 2, S. C. *Pitt v. Hunt*, 1 Vern. 18. 1 Eq. Abr. 58, pl. 3, S. C. *Povey and Browne v. Amhurst et al.* Gilb. Eq. Rep. 80. 2 Eq. Abr. 132, S. C. *Duke of Chandos v. Talbot*, 2 P. Wms. 608. *Bates v. Dandy*, 2 Atk. 207. *Hawkyns v. Obin*, id. 549. *Grey v. Kentish*, 1 Atk. 280. *Saddington v. Kinsman*, 1 Br. Ch. Rep. 51. *Worsal v. Marlar*, 2 Dick. 647. *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 469. *Clinton v. Hooper*, 1 Ves. 173. *Wright*

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

v. *Morley*, 11 *Ves.* 12. *Hyde v. Price*, 3 *Ves.* 437. *Newl. on Contr.* 131-2.)

6. But if otherwise, the equity is only to part and not to the whole ; and the full amount of the principal advanced by the appellant, with the interest thereon, ought, at least, to be re-imbursed him. (*Packer v. Wyndham*, *Prec. in Ch.* 412. *Squib v. Wyn*, 1 *P. Wms.* 378. *Lord Carteret v. Paschal*, 3 *id.* 197, 199. *Jewson v. Moulson*, 2 *Atk.* 417. *Earl of Salisbury v. Newton*, 1 *Eden's Rep.* 370. *Franco v. Franco*, 4 *Ves.* 515, 529. *Pryor v. Hill*, 4 *Br. Ch. Cas.* 138. *Burdon v. Dean*, 2 *Ves. Jun.* 607. *Oswell v. Probert*, *id.* 680. *Brown v. Clark*, 3 *id.* 166, 168. *Pringle v. Hodgson*, *id.* 617. *Macaulay v. Phillips*, 4 *id.* 15. *Lumb v. Milnes*, 5 *id.* 517. *Lady Elibank v. Montolieu*, *id.* 737. *Wright v. Morley*, 11 *Ves.* 12.) The counsel said, that these cases shew, not only the rights of the husband in the wife's property generally, but also as to the wife's equity, from them it would appear never to have been doubted, either in the case of general or particular assignees of the husband, that they shall hold subject only to a reasonable provision for the wife.

7. That the appellant is, at any rate, entitled to the dividends on the stock which were directed to be paid to the husband, free of all her claims until she attained 21.

*Talcott*, (Attorney General) & *B. F. Butler*, for the respondent, insisted upon the following points in support of the decree, and cited and commented upon the authorities following them respectively :

I. The deed of settlement executed by *Hewitt*, the father of the respondent, directing the dividends as they accrued to be paid to her during her minority and the stock to be transferred to her at the age of 21, clearly contemplated a personal enjoyment by her of the stock ; and, therefore, the assignment was in direct violation of the trusts declared by the deed of settlement, and consequently void. (*Hyde v. Price*, 3 *Ves.* 437 ; recognized as never having been questioned in *Meth. Epis. Church v. Jaques*, 3 *John. Ch. Rep.* 103. *Stone v. Lidderdale & others*, 2 *Anstruther*, 533, where the assignment of an officer's half pay was held void both in Equi-

ty and at law. *Sugden on Powers*, 111, 112. *Clancy's Rights of Women*, 52, 53, 382, 383, 384. *Roper on Revocations, &c. with Tracts upon the law of Baron and Feme*, 230, 301.) The case of *Jaques v. Methodist Episcopal Church*, (17 *John. Rep.* 548) the counsel said, merely sets up the general power of the wife to dispose of her separate property, without denying that a trust may be limited to her in such terms as to take away that right.

II. The assignment was also void, as against the equitable right of the respondent to have the stock secured for her separate use. This right, usually called *the wife's equity*, is perfectly reasonable and just; is well understood in Courts of Equity; and has been uniformly admitted and administered by them for more than a century.

The counsel said there were four classes of cases in support of this point:

1. Of the wife's equity as against her husband: (*Witham v. Waterhouse*, *Toth.* 91. *Ash v. Forrest*, *id.* 116. *Gibbons v. Moulton*, *Rep. Temp. Finch*, 346. *id.* 361. *id.* 367. *Mico v. Powell et ux.* 1 *Vern.* 39. *Oxendon v. Oxenden*, 2 *Vern.* 493. *Harrison v. Buckle*, 1 *Str.* 239. *Gardener v. Walker*, *id.* 503. *Winch v. Page*, *Bunb.* 86. *Milner v. Colmer*, 2 *P. Wms.* 638. *Adams v. Pierce*, 3 *id.* 11. *Brown et ux. v. Elton*, *id.* 202. 1 *Eq. Abr.* 64, (G) and the cases there cited. *Bond v. Simmons*, 3 *Atk.* 20. *Tomkyns v. Ladbroke*, 2 *Ves. Sen.* 591, 593. *Jewson v. Moulson*, 2 *Atk.* 417. *Ex parte Coysegame*, 1 *Atk.* 192. *Grey v. Kentish*, *id.* 280. *Meals v. Meals*, 1 *Dick.* 373. *Ellis v. Ellis*, 1 *Suppl. to Vin. Abr.* 475, (F) pl. 4. *Roberts v. Roberts*, *id.* 576, (F) p. 5. 2 *Cox*, 422, S. C. *Clinton v. Hooper*, 1 *Ves. Jun.* 173, 181, 185. *Lady Elibank v. Montolieu*, 5 *Ves.* 737. *Murray v. Lord Elibank*, 10 *Ves.* 84. 13 *Ves.* 1, S. C. *Carr v. Taylor*, 10 *Ves.* 574. *Howard et ux. v. Moffatt*, 2 *John. Ch. Rep.* 206. *Glen et ux. v. Fisher*, 6 *id.* 33. *Davison v. Atkinson*, 5 *T. R.* 434.)

2. Of the wife's equity as against the general assignees of the husband: (*Vandenanker v. Desbrough*, 2 *Vern.* 96. *Parker v. Dykes*, 1 *Eq. Abr.* 54, (B) *Jacobson v. Peer Williams*, *id.* 1 *P. Wms.* 382, S. C. *Grey v. Kentish*, 1

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

*Atk.* 280.\* *Ex parte Coysegame*, *id.* 192. *Worsal v. Marl*, 2 *Dick.* 647. 1 *Cox*, 153, *S. C.* under title of *Warrall v. Marl*, and *Bushnan v. Pell*. *Pryor v. Hill*, 4 *Br. Ch. Cas.* 138. *Bosvil v. Brander*, 1 *P. Wms.* 458. *id.* 459, note (1) *Burdon v. Dean*, 2 *Ves. Jun.* 607. *Oswell v. Probert*, *id.* 680. *Brown v. Clark*, 3 *id.* 168. *Freeman v. Parsley*, *id.* 421. *Lumb v. Milnes*, 5 *id.* 517. *Carr v. Taylor*, 10 *id.* 574. *Mitford v. Mitford*, 9 *id.* 87.)

3. Of the wife's equity as against a voluntary particular assignment: (*Clancy's Rights of Women*, 267. *Jewson v. Moulson*, 2 *Atk.* 420, *per Lord Hardwicke*)

4. As against the specific assignee for a valuable consideration: (*Saddington v. Kinsman*, 1 *Br. Ch. Cas.* 44. *Povey v. Brown*, *Prec. in Ch.* 325. *Jewson v. Moulson*, 2 *Atk.* 417. *Pope v. Crashaw*, 4 *Br. Ch. Cas.* 326. *Like v. Beresford*, 3 *Ves.* 506, 512. *Macaulay v. Philips*, 4 *Ves.* 19. *Wright v. Morley*, 11 *Ves.* 17. *E. S. Kenny v. Udall and Kenny*, the decision appealed from, 5 *John. Ch. Rep.* 464. *Haviland v. Myers*, 6 *id.* 25. *Haviland v. Bloom*, *id.* 178. *Earl of Salisbury v. Newton*, 1 *Eden's Rep.* 370.)

III. The equity of the respondent is materially fortified by the circumstance, that her marriage was clandestine, at a time when she was of a very tender age, a ward of the Court of Chancery, and her husband a bankrupt. (*Butler v. Freeman*, *Ambl.* 301. *Eyre v. Countess of Shaftsbury*, 2 *P. Wms.* 118. *Stackpole v. Beaumont*, 3 *Ves.* 98, *per Ld. Chancellor*. *Like v. Beresford*, *id.* 506. *Laws N. Y. sess.* 38, *ch.* 106, *s.* 1. *Call v. Coult*, 1 *Ves. & Bea.* 303. *Stevens v. Savage*, 1 *Ves. Jun.* 154. *Winch v. James*, 4 *Ves.* 386. *Chassaing v. Parsonage*, 5 *Ves.* 15. *Wells v. Price*, 5 *Ves.* 398. *Millet v. Rowse*, 11 *Ves.* 419.)

IV. The case is fortified still farther by the facts, that the consideration actually paid by the appellant for the assignment was neither meritorious nor fair; but grossly inadequate; and that in procuring it, a most oppressive advantage was taken of the husband's pecuniary distresses and necessities.

V. On the whole, the decree is warranted by the pleadings and proofs in the cause, and is in conformity to the settled law of a Court of Equity, on the subject.

ALBANY,  
April, 1824.

Udall

v.

Kenney.

*Henry*, in reply, reviewed the cases cited for the respondent, and remarked, that the whole class of cases which went to deny the husband a right to dispose of the wife's equity, proceeded upon the ground that it could not be reached at law, but only by the aid of this Court. They were English cases, and, therefore, went upon the law as it stood there. It is otherwise in this country as to legacies which, in whatever shape they may be devised, are recoverable by an action at law. The statute (1 R. L. 315-16, s. 19) which gives this right, has been in existence ever since 1743, (1 S. & L. 315; V. S. 229; 2 J. & V. 386; 1 K. & R. 540) and cuts up, at once, all the English doctrine as to the wife's equity in a legacy. It is no longer a mere equitable right. The husband may proceed at law; and a Court of Equity therefore will not and cannot restrain him, according to the doctrine of all the cases.

SAVAGE, Ch. J. On the 21st of June, 1814, *Thomas Hewitt*, of the city of New-York, being possessed of 310 shares in the capital stock of the *Bank of America*, executed a deed of settlement, by which, among other things, he transferred all his shares in the *Bank of America*, to the president, directors and company of that bank, in trust for the uses and purposes in the deed expressed; one of which is as follows: "In further trust to pay my daughter *Eliza* the interest or dividends accruing on eight thousand dollars of the said stock or shares, as the same accrues, for her education; and to transfer the principal thereof to her, at the age of 21 years." "If my said daughter *Eliza* dies under 21, and without issue, then the principal to go to my said son *Thomas*." It was also further provided, that if the bank should be about to be dissolved, then they should transfer the shares to *Jonathan Burrall*, *Henry Remson* and *Richard Riker*, to hold upon the same trusts. *Thomas Hewitt* died on the 12th of October, 1814, leaving the deed of settlement in full force. *Sidney Hewitt*, the mother of *Eliza*, was appointed,

Statement of  
the case.

Deed of set-  
tlement.

Guardian and  
trustee.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

Marriage.

Order to pay  
dividend to  
Kenney.

Pledge of the  
stock.

Order to pay  
dividends to  
Udall.

Bill.

by the Court of Chancery, guardian of her person, and *Isaac L. Kip*, Assistant Register, her trustee to receive the dividends and pay them over to *Sidney Hewitt* the guardian. Mrs. *Kenney* supposes she was, therefore, a ward of the Court of Chancery. On the 19th of January, 1818, *Eliza* intermarried with her present husband, *Edward M. L. Kenney*. She was then a little over 16 years of age, and was at a boarding school, where she had been placed by her mother. *Sidney Hewitt*, the mother and guardian, had been applied to for her consent to the marriage, but she refused it except on condition that it should be postponed for two years. Upon the marriage taking place the guardian was displeased, but became reconciled in about a week.

On the 9th of February following, *Kenney* was authorized by a rule of Court, founded on and reciting the marriage, to receive the dividends until the further order of the Court; and, by virtue of this order, he did receive one or more dividends. He became much embarrassed, and proposed to pledge or sell the stock. One *Ezra L. Ingraham* offered his services in effecting some negotiation, with a view to raise money. The appellant, *Udall*, became the purchaser, for the nominal price of \$5000, under circumstances which I shall hereafter advert to, and took an assignment, dated the 12th of December, 1818, executed by *Kenney* and his wife, who was still an infant; and paid, as he alleges, \$4500. Mrs. *Kenney* avers that only \$150 were applied to her use.

On the 17th of June, 1819, an order was granted, founded upon the sale to *Udall*, directing the dividends after the 1st of January, 1819, to be paid to him until Mrs. *Kenney* should arrive to the age of 21, or the further order of the Court.

On the 11th of November, 1820, she filed her bill, praying: 1. That the assignment to *Udall* might be declared null and void, as respects her individual rights to the stock, and that *Udall* might assign it to some proper person, as trustee for her; 2. That he might account for the dividends received by him; 3. That an order might be made, revoking the order of the 17th of June, 1819; 4. For such disposition of

the stock as would secure it for her own support and maintenance, and place it beyond the control of her husband.

On the 10th of August, 1821, the Chancellor declared the assignment to be void, as respected Mrs. Kenney's rights; rescinded the former orders for paying dividends to Kenney and Udall respectively; directed payment to Mrs. Kenney's solicitor, to the amount of the costs, and then to Mrs. Kenney herself; directed the bank not to permit a transfer of the shares; and leaving Mrs. Kenney, when 21 years of age, to apply for the stock, or so much as justice shall require, to be settled for her separate use and support. To reverse this decree is the object of the present appeal.

The determination of this cause, independent of the fairness or unfairness of the transaction, must depend upon the extent of the marital rights. The signature of the wife to the assignment gave it no additional validity. She was, on account of her infancy, incapable of doing any act, disposing of her property, or dispensing with her rights; and, on account of her coverture, she is presumed to have acted under the coercion of her husband. The assignment, therefore, must be considered as the act of the husband alone.

The interest of the husband was acquired by virtue of the marriage.

It is not disputed, that a husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife; and may, consequently, dispose of them, including not only her choses in possession, but in action, when the latter are reduced into possession. And the authorities go so far as to say, that if the husband can obtain possession of the wife's choses in action, without the aid of a Court of Chancery, he will be permitted to do so; and then to dispose of them at his discretion. But where the property of the wife is under the care of the Court, and the husband cannot enjoy it without the authority of the Court, care will be taken that before it is placed at the husband's disposal a suitable provision shall be made out of it for the wife's support.

That the general assignees of the husband stand in no better situation than the husband himself, admits of no dispute. But the cases are not perfectly agreed as to the situation of

ALBANY,  
April, 1824.

Udall .  
v.  
Kenney.

Decree.

Cause depends  
on extent of  
marital rights.

The assignment  
by the  
wife, she being  
an infant, was  
void.

So, by reason  
of her cover-  
ture.

Husband be-  
comes abso-  
lute owner of  
wife's choses  
in possession.

So of her  
choses in ac-  
tion, when re-  
duced into pos-  
session.

And, it seems,  
if he can ob-  
tain possession  
without the  
aid of chance-  
ry, he cannot  
be restrained  
as to the dispo-  
sition he may  
make of them.  
But if other-  
wise, the court  
will see that  
a suitable pro-  
vision is first  
made for the  
wife.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

Review of cases.

*Sir Edward Turner's case*,  
1 Vern. 7, A. D. 1681.

*Pitt v. Hunt*,  
1 Vern. 18.

*Tudor v. Samyne*, 2 Vern.  
270, A. D. 1692.

*Jacobson v. Williams*, 1 P. Wms. 382, A. D. 1717.

*Bosvil v. Brander*, 1 P. Wms. 458, A. D. 1718.

an assignee of a specific chose in action, or an assignee for valuable consideration. A concise review of the decisions will, therefore, be of service, in arriving at a correct conclusion.

It was determined by the Lords, in *Sir Edward Turner's case*, (1 Vern. 7) on appeal from Chancery, that a term assigned in trust for a *feme sole*, might be disposed of by the husband after marriage; but if it had been assigned for the use of the wife, by consent of the husband, then he could not meddle.

In *Pitt v. Hunt*, (1 Vern. 18) Chancellor Nottingham decreed according to this case, though contrary to all previous adjudications, and so admitted by the counsel.

In *Tudor v. Samyne*, (2 Vern. 270) the same doctrine was held, upon the authority of *Turner's case*.

In *Jacobson v. Williams*, (1 P. Wms. 382) before Lord Chancellor Comper, an infant, entitled to a legacy of £1000, intermarried with J. S. at 18 years of age, without the knowledge or consent of her father. J. S. becoming a bankrupt, the plaintiffs claimed the legacy as assignees. This claim was denied as to the principal sum, upon the ground that they stood in no better situation than the bankrupt himself, to whom the Court would not have allowed it without a provision for the wife and children. For the same reason, it was said, the assignees had a right to the interest during the husband's life. But, at a subsequent day, the Chancellor dismissed the bill, upon the ground that the legacy depending on a contingency which had not ceased when the assignment was executed by the commissioners, therefore nothing passed, not even the interest.

In *Bosvil v. Brander*, (1 P. Wms. 458) a *feme sole*, mortgagee, married a tradesman who became a bankrupt, and the commissioners assigned all his estate, real and personal. Then the husband died, and his widow filed her bill to have the benefit of the mortgage. But the Master of the Rolls decreed against her, on the ground that, as there was a covenant to pay the money, the legal estate was vested in the assignees. It was said, however, that if the husband or the assignees had asked the aid of Equity to enforce the mort-



gage, the Court would have refused this, unless some provision had been made for the wife.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

In *Duke of Chandos v. Talbot*, (2 P. Wms. 608) before King, Ch. the question was, whether a legacy of £1000, given to *Dorothy Doliman*, payable at her age of 25 years, and assigned by her and her husband for £750, before she became of age, was a good assignment; and it was decided that, being a personal thing, the husband alone might assign it, and as to its being a contingency, that was no objection, for the possibility of a term might be assigned by the husband alone; and *Theobalds v. Duffry*, (9 Mod. 102) was cited.

*Duke of Chandos v. Talbot*, 2 P. Wms. 608, A. D. 1731.

In *Bates v. Dandy*, (2 Atk. 207) the husband had borrowed money, and pledged two mortgages, to which his wife had an equitable title, and promised in writing to assign them as security. But dying without having made the assignment, Lord *Hardwicke* held, that the husband's promise to assign amounted, in equity, to an assignment *pro tanto*, the residuè belonging to the wife. And it is then declared, that the husband may assign the wife's chose in action, or a possibility that the wife is entitled to, as well as her term, if the assignment be for valuable consideration.

*Bates v. Dandy*, 2 Atk. 207, A. D. 1741.

In little more than a year afterwards, came the case of *Jewson v. Moulson*, (2 Atk. 417) which has been fully stated by his Honor the Chancellor, in his opinion. The husband assigned to the defendant, for an honest debt, the share of his wife in her father's estate, which depended on the contingency of her arriving at 21 years of age. He afterwards assigned the same to trustees, for the benefit of all his creditors. Lord *Hardwicke* said, that the equity was extremely plain against the husband and his general assignees; that the Court will not suffer the husband to take the wife's portion, till he makes a reasonable provision for her; and he dates this doctrine as far back as the 14th of *Charles* the first. He further remarked, that if the husband could obtain possession of his wife's chattels without the aid of the Court, he knew of no instance in which it had interfered; but he expressed a doubt whether an injunction would not be grant-

*Jewson v. Moulson*, 2 Atk. 417, A. D. 1742.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

ed, at the wife's request, to stay execution till provision be made for her. He then refers to several previous cases, and mentions *Tudor v. Samyne*, *Boscill v. Brander*, and *Bates v. Dandy*, in which, he observes, the assignee for valuable consideration had got the better of the wife's equity. The circumstances of the case were much relied on, the wife's infancy; that the assignment was not of a particular thing, but her whole fortune; the clause of survivorship; the requisite aid of the Court to obtain possession of her fortune; and the presumed knowledge of *Moulson*, the creditor of all these facts, as well as of the rule in Equity as to making provision for the wife out of her own fortune. He lays great weight upon several facts which were parallel with those in this case—that the wife's whole fortune was assigned—that the husband was in debt before he married—ran away with his wife clandestinely. And he says, if an assignee for valuable consideration is to be protected, all the care and guardianship which the Court extends to infants would be entirely defeated. He, therefore, determined not to allow the whole to the creditor, without making provision for the wife. The parties settled, by dividing the fund, and Lord *Hardwicke* confirmed the agreement.

When husband comes for wife's equity, he must do equity.

And so the wife may ask the aid of the court against her husband.

In these cases the doctrine is; that when the husband or his assignees come into Equity to obtain possession of the wife's choses in action, the Court will compel them to do equity. It seems, however, that if the wife's fortune is the subject of equitable cognizance, it is immaterial, in this view, who asks the aid of the Court. The same consequences follow, in whatever shape the matter is brought forward. Accordingly, in *Grey v. Kentish*, (1 *Atk.* 280; 1 *P. Wms.* 459, n. *S. C. corrected*) the wife's property was, by a decree of Chancery, vested in *South Sea* annuities. The husband assigned it as security for £150, and became bankrupt. The wife petitioned that the annuities might be transferred to her. Lord *Hardwicke* said, that a husband cannot assign a possibility in law, but Equity will support such an assignment for valuable consideration. This was not an assignment, but a pledge, and as the particular and general as-

*Grey v. Kentish*, 1 *Atk.* 280, *A. D.* 1749; 1 *P. Wms.* 459, n. *S. C. cited and corrected.*

signees took with notice of the equity of the wife, it was decreed to her.

In *Saddington v. Kinsman*, (1 Br. Ch. Cas. 51-2) Lord *Thurlow* said, that in the case of an assignment for valuable consideration, no provision is made for the wife; but the cause was never decided. He referred to *Gayer v. Wilkinson*, (1 Br. C. C. 50, note) which denied that a wife's equity passed by a bankrupt assignment, and asked the counsel whether they knew of any case in point which contradicted it?

In *Worrall v. Marlar*, and *Bushnan v. Pell*, (1 P. Wms. 459, note) *Sarah Worrall*, the wife of an insolvent debtor, was entitled, by bond from her father, to a share of his estate. The father, by will, after the insolvency of her husband, gave her £8000, in lieu of her claim by virtue of the bond. She filed her bill, praying that the £8000 might be settled upon her, to her separate use, and the use of her children. *Bushnan*, her husband's assignee, filed his bill, praying for an account under the bond, and to elect as the husband might if he had not become insolvent. Lord *Thurlow* was clearly of opinion, that the interest of the wife was assignable, but that the claim of the creditors extended only to the interest taken under the bond; and as to that under the will, the assignee should make proposals for a settlement on the wife and children. His Lordship added, that he had considered the several cases on the subject, and did not find it any where decided, that if the husband make an actual assignment, by contract, for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; but that a Court of Equity has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law. In the latter case, the creditor stood in the place of the husband, as respects the wife's equity. After proposals had been made, one half the amount due on the bond was decreed to the creditors, and the residue of the £8000 to the wife.

It will be seen, that the decision of this case did not require the observations of Lord *Thurlow*, relative to assignees

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

*Saddington v.  
Kinsman*, 1 Br.  
Ch. Cas. 51-2,  
A. D. 1779.

*Worrall v.  
Marlar, and  
Bushnan v.  
Pell*, 1 P.  
Wms. 459, n.  
A. D. 1784.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

for valuable consideration. What he said on that subject was, therefore, altogether *obiter*. At all events, he was mistaken in supposing that there were no cases establishing the wife's equity, as against assignees for valuable consideration. There is a short note of this case in 2 *Dick.* 647, under title of *Worsat v. Marlar*.

Many cases de-  
claring wife's  
equity, as a-  
gainst her hus-  
band, cited by  
respondent's  
counsel, supra.

The doctrine of the wife's equity will be found distinctly declared, as against the husband, in a great number of cases, cited by the counsel for the respondent; but it cannot be necessary even to name them here. The cases already commented on, leave no doubt as to the doctrine and practice of the Court to sustain the wife's equity against her husband, his assignees by operation of law, and his voluntary assignees. And the only question in the case is as to an assignee for valuable consideration.

Gayner v. Wil-  
kinson, 2 *Dick.*  
491, A. D.  
1783.

In *Gayner v. Wilkinson*, (2 *Dick.* 491) the plaintiffs, as assignees of the husband, claimed a contingent legacy given to the wife but not reduced into possession in the life of the husband. Lord *Bathurst* remarked, that there is a difference between an assignee for a consideration, and the assignees of a bankrupt, because a general assignee must sue in his own name, but a particular assignee must sue in the name of the husband. He adds, that if the husband dies before the subject of the assignment is recovered, the assignee will lose all legal remedy, and must come into Chancery for its assistance; that particular assignments have been sometimes supported, but not generally; that the Court will not strip a widow and children; that the interest of the wife was not such a legal interest as the husband could assign; and he dismissed the bill. He cited *Wennan v. Mason*, where the wife had joined her husband in the assignment, and yet she was allowed a settlement of £300.

Pope v. Cras-  
shaw, 4 *Br.*  
Ch. Cas. 326,  
A. D. 1793.

In *Pope v. Crashaw*, (4 *Br. C. C.* 326) the Master of the Rolls said, he hoped it would be understood, that a husband cannot by assigning his wife's property bar her of any equity she may have in it. That he should never subscribe to the contrary doctrine.

Burdon v.  
Dean, 2 *Ves.*  
Jun. 607, A.  
D. 1795.

In *Burdon v. Dean*, (2 *Ves. Jun.* 607) the right of the wife to her equity was distinctly admitted and allowed.

The case of *Like v. Beresford*, (3 Ves. 506) was much stronger than the present in favour of the assignee for valuable consideration. The wife was entitled to a legacy, in bank stock, on the day of her marriage. She eloped with *Beresford*, in October, 1780, and about the same time a bill was filed in her name, against the trustee, and the stock was transferred to the name of the Accountant General. The real object of the bill was, to make the wife a ward of the Court of Chancery. *Beresford* filed his bill to obtain the stock; and during the pendency of the suit borrowed money of one *Roberts*, and conveyed the stock to him in trust to sell and pay himself, and to pay over the residue to *Beresford*. *Beresford* also became indebted to *Like*, the plaintiff, for money and necessities furnished to him and his wife; in consideration of which, and of moneys to be advanced by *Like*, *Beresford*, by deed of assignment of March, 1783, conveyed the stock to *Like*, subject to *Roberts*' claim. The whole, being upwards of £5000, was decreed to trustees, for Mrs. *Beresford*; and the object of *Like*'s bill was, to obtain payment of his demand out of the dividends accrued subsequent to the marriage; It was insisted, for the plaintiff, that whatever is the rule as to the husband's right to assign his wife's fortune for valuable consideration, at least, he should be allowed the dividends accrued, and that he might, for valuable consideration, assign an equitable estate in the wife's property. But the Master of the Rolls decreed against the plaintiff, relying on the declaration of Lord *Hardwicke*, in *Jewson v. Moulson*, that the right of the husband to assign would put an end to the equity of the wife. Much weight was placed on the fact that the wife was a ward of the Court.

In *Macaulay v. Philips*, (4 Ves. 19) speaking of the decision in *Like v. Beresford*, the Master of the Rolls says, the guard of a Court of Equity upon the wife's interest would be very singular, if the husband, not being entitled at law, might assign it for valuable consideration to another person, who would be entitled in Equity; and it never was decided, that the husband could by such assignment or any other means deprive her of her equity.

ALBANY,  
April, 1824.

Udall

v.  
Kenney.

*Like v. Beresford*, 3 Ves.  
506, A. D.  
1797.

*Macaulay v. Philips*, 4 Ves.  
19, A. D.  
1798.

ALBANY,  
April, 1824.

Udall

v.

Kenney.

I will notice but one other case on this point. In *Johnson v. Johnson*, (1 *Jac. & Walk. Rep.* 456) the doctrine of the two last cases is adhered to. The Master of the Rolls admits, that an assignment for a valuable consideration is sufficient to bar the right of the wife, surviving; but that it does not, however, take away her equity. All this, he adds, is too clear to admit of any doubt.

Wife's equity cannot be taken from her, except by her consent in open court, or by a suitable provision for her.

Rule is the same as to husband and his assignee, general or special, in law or in fact, voluntary or for a valuable consideration.

11 *Ves* 12. 4  
*id.* 515. 1 *Des.*  
263. 2 *John.*  
*Ch. Rep.* 206.

The extent of provision for the wife is a subject of reference to a master, and must, from its nature, depend on the circumstances.

It appears, therefore, to be established beyond all dispute, that the personal property of a *feme covert* which is under the protection and control of the Court of Chancery, cannot be taken from her without her consent in open Court, or by a suitable provision being made for her out of the property. And it matters not whether the application for the property be made by the husband, or his assignee in law, or his assignee for a valuable consideration. Whether the Court will extend its aid to property which the husband or his assignee can reduce to possession at law, is not absolutely decided; nor does that question arise here.

To the cases already mentioned may be added, *Wright v. Morley*, (11 *Ves.* 12) and *Franco v. Franco*, (4 *Ves.* 515) in *England*; and, in this country, *Ex parte Beresford*, (1 *Des.* 263) and *Howard v. Moffatt*, (2 *John. Ch. Rep.* 206.) And, on the whole, I fully concur with his Honor the late Chancellor, when he says, "I consider the wife's equity, as against any assignment whatsoever and to whomsoever, to be now too well settled to be shaken."

As to the amount of the wife's estate which shall be secured to her, that is a proper subject of reference to a Master, and must necessarily be determined by the circumstances of each particular case. The rule is, that an *adequate* provision be made for the wife, and the children if there are any. What shall be considered *adequate* must depend entirely on circumstances. In some cases the whole has been allowed the wife—in one case an annuity of £40 *per annum*—in another the interest of £8000. In other cases, the half has been assigned, by agreement, and sanctioned by the Court; and, again, £100, out of an annuity of £260, was decreed to the assignee of the husband. This part of the subject is

here in no wise important, except so far as relates to that part of the decree of his Honor the Chancellor which rescinds the previous orders of the Court, allowing the dividends of the stock in question to be paid first to *Kenney* and afterwards to *Udall*, and directs those accruing subsequent to filing the bill to be paid to Mrs. *Kenney* herself, after payment of the costs, till the further order of the Court.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

The general rule undoubtedly is, that the interest of the wife's property may be received by the husband, where he lives with and maintains her. but not when he leaves her unprovided. (*Watkins v. Watkins*, 2 *Atk.* 96. *Sleech v. Thornton*, 2 *Ves. Sen.* 562. *Wright v. Morley*, 11 *Ves.* 12.)

Interest to be paid husband who lives with and maintains wife; and the exceptions to this rule.

In *Bond v. Simmons*, (3 *Atk.* 20) Lord *Hardwicke* said, that when a husband has received a great part of his wife's portion, and only a small part remains, and the husband is so perverse that he will not make a competent settlement on the wife, the Court will not only stop the payment of the residue, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance. And in *Bullock v. Menzies*, (4 *Ves.* 799) the Court refused to give the wife any part of the interest of her own property, because she refused to live with her husband, when he was willing to receive and provide for her.

3 *Atk.* 20.

4 *Ves.* 799.

In some cases a reference has been directed, to ascertain the fact of the husband's providing for his wife. If that fact be material in this case, it is pretty clear, from the pleadings and proofs, that the husband has totally neglected his duty in this respect. So far from providing for his wife, it appears to have been his object to squander the whole of her patrimony as fast as possible. He, therefore, does not come recommended to the favor of the Court, and in justice to the wife, it ought to direct the payment of the dividends either to her or to some trustee for her benefit.

But the question here is not between the husband and wife. The appellant claims to be a *bona fide* purchaser, by contract, for valuable consideration. Admit, for the present, that he is so. What did he purchase? Clearly, nothing but the right to be substituted for the husband, as to his inter-

Question here is not between husband and wife, but between her and one who claims to be a *bona fide* purchaser.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

He can, as such, claim no greater rights than the husband, but stands in husband's place, taking subject to wife's equity.

And that he is a *bona fide* purchaser is questionable.

It seems, inadequacy of price, alone, is not a ground for setting contract aside.

Advantage was taken of husband's pecuniary distresses.

Purchaser had notice of wife's claim ;

rest in the wife's property. In *Wright v. Morley*, Sir William Grant, reasoning on the subject, asks, "If the husband has but the right of reducing the wife's interest into possession, how can he, for valuable consideration or otherwise, convey more than he has ? If he parts with it for valuable consideration, and the assignee acquires a right different from that which the husband had, he parts with something different from what he has ;" and he might have said *more than he has*. And in this instance, if the claim of the appellant be allowed on account of his character of *bona fide* purchaser for valuable consideration from the husband, by that very purchase he has, in connexion with the husband, stripped this infant wife, probably, of her whole fortune, and reduced her to beggary—from competence, if not affluence, to absolute penury. But he has chosen to put himself in the situation of the husband. The Court will leave him there.

That the appellant is a *bona fide* purchaser for valuable consideration, is at least questionable. It is not necessary to impute to him absolute fraud ; but the facts in the case shew that an unconscientious advantage was taken of *Kenney's* situation. The stock was offered to him at a bargain ; and had he contracted with persons on an equal footing with himself, notwithstanding the enormous speculation, the inadequacy alone would not induce the interference of the Court.(a) Nor is it necessary now to interfere solely on that ground. But it is certainly true, from his own shewing, that he took at least \$2000, from these poor, distressed, and improvident people ; making due allowance for every risk he run, with the exception of the claim of the wife's equity. By advancing money before the terms were absolutely settled between him and *Kenney*, he placed him in a situation which compelled him afterwards to submit to such conditions as might be imposed. The appellant entered into the purchase after an examination of the deed of settlement. He acted against the advice of counsel, and, as must be presumed, whatever may be the fact, with a full knowledge of the wife's rights. His subsequent purchase of his own

(a) Vid. *Seymour v. Delancy*, ante, 445.



bond, for half the amount secured by it, as the Chancellor justly observes, marks the character of the whole transaction.

The appellant has, however, actually parted with his money, to a certain amount, and justice requires that it should be refunded to him by the husband ; and this may be done out of the wife's property, provided there is sufficient, after making an adequate settlement upon the wife. To discuss this subject farther might be premature. I have no hesitancy, however, in saying, that if the stock in question is her whole fortune, it is not too much for her support ; and it should be settled upon her, for the support of herself and children, if any.

The result of my researches and reflection on this case is—

1. That the wife has an undoubted right to an adequate provision for her, and her children, if any, out of her equitable property, as against her husband, or any assignee of the husband. And when it is necessary to come into a Court of Equity, for its aid in obtaining possession of such property, the Court will see that proper provision shall be made.

2. That though, in general, a husband who lives with and maintains his wife is entitled to receive the dividends or interest of her estate, yet when the husband deserts his wife, or neglects or refuses to provide for and maintain her, or when he has misbehaved himself, and ran away with a ward of the Court, and, I would add, when he has shown a total incapacity to manage his concerns, or a disposition wantonly to waste his wife's property, in such cases the Court ought to direct the interest to be paid, either to the wife, or to a trustee for her benefit.

I am, therefore, of opinion, that the decree of his honour the late Chancellor be affirmed, except so far as it rescinds the former orders of the Court of Chancery, directing the dividends to be paid first to *Kenney*, and afterwards to *Udall*, and that part directing the dividends which accrued before the decree to be paid to Mrs. *Kenney*. By the order of the 9th February, 1818, the dividends were directed to be paid to *Kenney* till the further order of the Court ; and by the

Vol. III.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

But he is entitled to what may remain after provision for wife.

Wife has right to provision out of her equitable property, against husband or any of his assignees.

Though husband who lives with and maintains his wife is entitled to the interest of such property, yet if he neglect to do this, or has ran away with and married a ward of the court, or has shewn incapacity to manage his concerns, or a disposition to waste his wife's property, court should direct the interest to be paid to her, or to some trustee for her benefit.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

order of *June 7th*, 1819, the dividends which accrued after the *1st January*, 1819, until Mrs. *Kenney* should arrive at the age of 21 years, or till the further order of the Court in the premises, were to be paid over to *Udall*. It seems to me just, therefore, that the appellant should have received the dividends until the *10th day of August*, 1821, when the decree was made.

Question as to amount of provision, depending on circumstances, to be referred to a master.

Overplus to be paid appellant.

The amount which will be an adequate settlement for the wife must, of course, be ascertained by a Master of the Court of Chancery. The amount actually paid by the appellant ought also to be ascertained by a Master. And on the coming in of his report, should there be any thing left after making a competent provision for the wife, it is perfectly equitable and proper that the surplus be applied to the reimbursement of the amount actually advanced by the appellant.

For affirmance,  
24—for reversal,  
3.

WOODWORTH, J. and BOWNE, BRONSON, BURROWS, BURT, CLARK, CRAMER, DUDLEY, EARLL, GARDINER, GREEN, HAIGHT, LYNDE, MALLORY, M'INTYRE, MORGAN, NELSON, REDFIELD, SUDAM, THORN, WARD, WHEELER and WRIGHT, Senators, concurred.

BOWMAN, M'CALL and WOOSTER, Senators, dissented.

Decree.

A majority of the Court concurring in the opinion of SAVAGE, Ch. J. it was thereupon ORDERED, ADJUDGED and DECREED, that the assignment of the bank stock and dividends in the pleadings mentioned, made by *Edward M. L. Kenney*, the husband of the respondent, *Eliza S. Kenney*, to the appellant, *Richard Udall*, on the *12th day of December*, 1818, was and is subject to the equity of the respondent, *Eliza S. Kenney*, to an adequate settlement and provision therefrom; and that the right and equity of the said respondent to such settlement and provision, out of the said bank stock, remain wholly unimpaired; and that the decree of the Court of Chancery made in this cause on the *10th day of August*, 1821, so far as the same declares such equity of the said respondent, be, and the same is hereby affirmed. But inasmuch as it appears to this Court, that the appellant, *Richard Udall*, was entitled, under the orders of the Court of Chan-

cery referred to in the pleadings, and directing the dividends of the said stock to be paid to the said *Edward M. L. Kenney*, and afterwards to the said appellant himself, to receive the said dividends until the date of the said decree so made in this cause by the said Court of Chancery—it is ORDERED, ADJUDGED and DECREED, that so much and such part of said decree as rescinds the said orders, and directs the dividends on the said stock which were received since the said 11th day of *November*, 1820, and prior to the making of the said decree, to be paid to the solicitor for the said respondent, be, and the same is hereby *reversed*; and that the same be paid to the appellant. And it is further ORDERED, ADJUDGED and DECREED, that the record in this cause be remitted to the Court of Chancery; and that it be referred to one of the Masters of that Court, to ascertain and report as to the fortune and estate of the respondent, *Eliza S. Kenney*, derived from her father, *Thomas Hewitt*, or otherwise, and the disposition thereof; and, generally, as to the property, estate, condition and circumstances of the said *Eliza S. Kenney* and her husband, *Edward M. L. Kenney*, at the time of their marriage, and also at the time of making such report; to the end that such competent and adequate settlement and provision may be made, for the separate use and maintenance of the said respondent, and her children, if any she has, or may have, out of the aforesaid bank stock, and the dividends which accrued thereon after the said decree, as may be just, regard being had to all the circumstances of the case, as the same shall appear on the coming in of such report; and that the surplus, if any, be decreed to the appellant, &c.

ALBANY,  
April, 1824.

Udall  
v.  
Kenney.

ALBANY,  
April, 1824,

Osgood  
v.  
Manhattan  
Company.

WALTER F. OSGOOD and others, plaintiffs in error,  
against  
The PRESIDENT and DIRECTORS of the MANHATTAN COM-  
PANY, defendants in error.

The acts or admissions of executors are not evidence against heirs or devisees.

Thus, a petition to the surrogate by executors, for a sale of real estate of their testatrix, accompanied with a sworn account of the personal estate, is not evidence to shew the insolvency of the ancestor at the time she conveyed the real estate in question to certain persons, in an action by a creditor against her heirs and devisees, seeking to shew that such conveyances were voluntary and fraudulent, whereby the subject of them became assets in the defendants' hands.

Even a judgment against executors is not evidence against the heir.

To make the confessions of one man evidence against another, they must have a joint interest in possession.

The confession of a grantor, or his executors, after the grant, are not admissible, in evidence, to prejudice the rights of the grantee.

Whether the confession of one of a corporation aggregate be evidence against the company? *Quere.*

If improper evidence be given in the court below, though it be merely cumulative, the judgment will be reversed.

**ERROR, from the Supreme Court.** The action in that Court was assumpsit, by the the *President and Directors of the Manhattan Company* against *Walter Franklin Osgood, Edmund Charles Genet and Martha B.* his wife, *Samuel Osgood and Juliana* his wife, *Susan K. Osgood, De Witt Clinton and Maria* his wife, *John L. Norton and Sarah* his wife, and *Hannah Clinton*, which *Walter, Martha, Juliana and Susan*, were alleged, in the declaration, to be heirs and devisees, and *Maria, Sarah and Hannah*, heirs of *Maria Osgood*, deceased. The action was upon two promissory notes, the one dated the 25<sup>th</sup> July, 1814, for \$6000, payable at 90 days, the other the 10<sup>th</sup> August, 1814, for \$500, payable in 60 days, both endorsed by *Maria Osgood*. The memorandum was of October term, 1815. The defendants, *De Witt Clinton and Maria* his wife, *John L. Norton and Sarah* his wife, and *Hannah Clinton*, pleaded *riens per descent*,

and the plaintiffs took judgment of assets *quando acciderint*.

The other defendants, *Walter F. Osgood*, *Edmund C. Genet* and *Martha B.* his wife, *Samuel Osgood* and *Juliana* his wife, and *Susan K. Osgood*, pleaded the general issue, and also, as to the said *Walter*, *Martha*, *Juliana* and *Susan*, *riens per descent* or *devise*, to which the plaintiffs replied assets at the time of the commencement of the suit by descent and devise. The cause was tried before the late Mr. Justice *Van Ness*, at the *New-York* sittings, in *December*, 1816.

*Samuel Osgood*, the elder, was seised of several houses and lots of land in the city of *New-York*, and made his will, dated the 8th of *February*, 1792, by which he devised to his wife, *Maria Osgood*, all the estate, both real and personal, of which he was then possessed, or might be possessed at the time of his decease, and appointed her sole executrix. He afterwards purchased some lots of land at *Greenwich*, and died on the 23d of *August*, 1813. *Maria Osgood* was, before and at the time of his death, seized, in her own right, of three several houses and lots of land, situate in *Cherry-street*, in the city of *New-York*, which she conveyed by three several deeds, bearing date the 31st of *May*, 1814, in consideration of love and natural affection, to her three daughters, the defendants, *Martha B.*, *Susan K.* and *Juliana*, respectively.

*Maria Osgood* made her will on the 27th of *July*, 1814, by which, after several specific bequests of money and chattels, and particularly several bequests to *Walter F. Osgood*, she devised the residue of her real and personal estate to her children, the defendants, *Martha B.*, *Juliana*, *Walter F.* and *Susan K. Osgood*, and appointed the defendants, *Walter F. Osgood*, *Samuel Osgood* and *Edmund C. Genet*, her executors. The testatrix died on the 8th *October*, 1814, and the notes in question, which afterwards fell due, remained unpaid. The real estate devised was heavily encumbered by mortgages.

A variety of evidence was produced at the trial, to show that, at the time of the conveyance to her daughters, *Mrs. Osgood* was insolvent; and, for that purpose, the plaintiffs also produced the petition of her executors to the Surro-

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

gate of the city and county of *New-York*, dated *January 10th*, 1816, stating that the personal estate of the testatrix was insufficient to pay her debts, and requesting the aid of the Surrogate in the premises, pursuant to the statute in such case made and provided ; to which was attached an account between the executors and the estate, with an account of the personal property and debts of the testatrix, omitting to say when they arose, or whether due when Mrs. *Osgood* conveyed. These accounts were sworn to by the executors ; but before any order was made by the Surrogate upon the petition, they declined proceeding farther, alleging that they had acted under a misapprehension. The admission of this testimony was objected to on the part of the defendants, but it was received by the Judge, and the defendants excepted. A considerable part of the debts of the testatrix consisted of endorsements for the accommodation of *Walter F. Osgood*.

The Judge charged the jury strongly in favor of the plaintiffs upon the point whether the deeds from Mrs. *Osgood* to her daughters were voluntary, fraudulent and void as to creditors ; and the estate embraced by them was, consequently, as to the plaintiffs, assets by descent or devise, under the issue joined on the plea of *riens per descent* or *devise*, in the hands of the defendants, who were parties to that issue.

The jury found a verdict for the plaintiffs, on which the Court below gave judgment, in *January* term, 1818 ; and the cause came here upon bill of exceptions, containing the above point upon the admission of evidence, with others which it is not necessary to notice.

The reasons in support of the judgment below were rendered, as in 15 *John. Rep.* 167-8, S. C. ; (1 *Cowen's Rep.* 65, S. C. upon a question of amendment.)

*S. Jones*, for the plaintiffs in error. The Judge decided erroneously, in admitting the petition and schedule presented to the Surrogate by the executors of *Maria Osgood*, as competent evidence to show that she was indebted on the 31st of *May*, 1814, and also (subsequently to that day) at the time of her death ; and especially in admitting the petition

and schedule as evidence against those who had never signed, or in any way admitted or recognized them as true.

In Chancery, the answer of one defendant will not be listened to as evidence, even against his co-defendant. This is upon a principle which applies with much greater force here, where admissions out of Court, by third persons, not parties, are insisted upon as taking away the rights of these grantees. (*Phanix v. Dey & others*, 5 John. Rep. 412. *Grant v. U. States Bank*, 1 Caines' Cas. Err. 121. *Leeds v. The Mar. Ins. Co.* 2 Wheat. 380.) The answer of a minor by his guardian is never received as evidence against the former; nor will the confession of one partner implicate another, unless made during the continuance of the joint business, and in relation to the partnership estate. The petition and schedule, though sworn to, were no more than a mere *ex parte deposition*; and it is a most dangerous relaxation of the rules of evidence, to say that this shall be evidence against a stranger. What connexion is there between executors and heirs which makes the acts of the former evidence against the latter? Their rights and liabilities are entirely distinct. (*Jackson v. Hoag*, 6 John. Rep. 59.) In *Mason's Devises v. Peters' Administrators*, (1 Munf. 437) it was decided, that even a judicial recovery against an executor is no evidence against a devisee or heir. Is a mere admission of higher authority than a judgment at law, upon the very question in dispute? True, as against the executors themselves, the evidence would be admissible; but it cannot be so against a mere stranger; nor would the admission of one co-heir be evidence against another who should be party in the very suit where it was offered, unless both should be so connected in the pleadings as to be incapable of severance. Beside, what renders the decision in this case more strikingly erroneous is, that *Walter F. Osgood*, one of the executors who petitioned, was interested to charge the real estate conveyed.

Again: this petition and schedule were not the highest evidence which the nature of the case admitted. The original evidences of debt should have been produced; and why not file a bill of discovery, and ask the heirs themselves

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

for the amount of the debts, instead of relying on the acts of strangers? *Johnson v. Beardslee*, (15 John. 3) was relied upon by the Court below; but the promise of executors, who were also heirs, was there received merely to take the case out of the statute of limitations. It is well settled, that evidence will be received to take a case out of the statute, which is too slight to establish a debt. *Phillips' Ev.* 192; 15 *East*, 34, 35; and 4 *John. Rep.* 461, are also relied upon; but these authorities do not apply. It may be that where there is a joint interest, a declaration by one is evidence against all who are parties to the suit in which it is offered; that is to say, where they all constitute one person. Where there is a privity, or a joint demise, or the plea of the defendants admits a joint demand, perhaps the same rule applies. The authorities cited by the Court will support a class of cases where a witness makes a declaration against his interest, and dies. You may then give it in evidence; but even this is limited to a case where he could testify to the fact, if alive. No excuse but death will then answer. Absence, sickness, &c. will be unavailable. The principle of these authorities has no application to the present question.

*J. V. Henry*, for the defendants in error. The petition and schedule objected to were the act of *Maria Osgood's* executors. She is the person under whom the defendants claim; and her executors, appointed by her, were acting within the sphere of their official duty, recognized and required of them by the statute, (1 *R. L.* 450-1, s. 22.) They had power, by this statute, to obtain a Surrogate's order, and sell this very real estate which the defendants complain was affected by their act. As the personal representatives of the testatrix, they rendered an account of her debts with a view to a payment of her creditors. They confined themselves to the personalty, and in this view their acts are the most satisfactory evidence of what she owed. No person could perform this duty except the executors, and for this purpose they stood in her place. Suppose we had offered to shew an oral admission of the executors, that when Mrs. O-



ALBANY,  
April, 1824.Osgood  
v.  
Manhattan  
Company.

*good* executed this conveyance she was indebted to the *Manhattan Company* \$10,000. Would not this evidence be admissible? Recollect it was not offered to charge the defendants below directly with a debt, but to establish the collateral fact of insolvency? One of the executors, *Walter F. Osgood*, and *Mrs. Genet*, the wife of another, and *Juliana*, the wife of *Samuel Osgood*, were also devisees, having a common interest with the other defendants, in the land; and their acts were received merely as evidence, *prima facie*, that *Mrs. Osgood* was indebted—nothing more. We are asked, why not file a bill of discovery? For what end? Had we done this, we should have been referred to the Surrogate's office. *Mason's Devisees v. Peter's Administrators*, (1 *Munf.* 437) does not apply; because, in that case, the judgment was offered as direct and conclusive evidence to charge the realty. Here it was merely one item in the proof to shew the intent of the conveyance. It was not to charge the defendants with a debt, though this might be the consequence of establishing the fraudulent intent. Several analogous cases are cited in 1 *Phillips' Ev.* 191, 192, 193. Among these are the entries and declarations of deceased persons. The signing a bill of lading by a master of a vessel, is admissible to charge the insurer, at the suit of the consignee. (*Haddow v. Parry*, 3 *Taunt. Rep.* 303.) So declarations by a person having a joint interest with the party, (1 *Phil. Ev.* 72, 2 *Am. ed.*) or by a rated parishioner upon a question of settlement, are admissible. (*The King v. The Inh. of Hardwick*, 11 *East*, 578.) *Gilb. Ev.* 59, *Lond. ed.* 1791, note (v), states a case of covenant against two defendants, and the affidavit of one was received as evidence against both. Suppose a partner of the ancestor should acknowledge a debt due from the firm—would not this be clearly admissible in evidence against his heirs or personal representatives? The objection, however, if it prevails, will merely be the foundation of a new trial.

*Talcott*, (Attorney General) in reply, It is not disputed, that in order to charge these defendants, it was necessary to shew that the ancestor was insolvent when she conveyed;

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

or, at any rate, so much in debt as to authorize an inference of fraud. This was clearly necessary, to warrant the Court in setting aside a conveyance to the children. To support this allegation, a statement signed by the executors, one only of whom is a devisee and heir, is produced. The petition is dated in *May*, 1816, and, at the close, a list of debts is given, without a single date by which to determine whether they arose before or after the alienation. Yet it was received to prove an indebtedness, not at the time when the inventory was made, (for this was utterly immaterial) but that the grantor was insolvent two years before. Upon what principle, if admissible at all, can this schedule be received to make her indebted in 1814, when she conveyed?

But it was not admissible for any purpose against the defendants below; and, if so, no matter what other evidence was given—there must be a new trial. (*Marquand v. Webb*, 16 *John*. 89.)

In the first place, it was not the best evidence. The creditors themselves should have been called, and the proper documents produced and proved by witnesses, to establish the debts, where there were such. The executors did not know what the debts were. They had probably been told that they were so much; but, on oath, the creditors might not have sworn to it.

Again: it is enough that the suit was against heirs and devisees, but the acknowledgment by executors; and the question is, not whether one may charge property, by his confession, in which he is interested, but property in which he has no manner of interest. It is said, that the evidence was not to charge the defendants with a debt; but this is a mistake. It was to make them liable in every sense of the word. Even their persons were to be made liable to a *ca. sa*. It is also said, these executors were acting in reference to personal property, and hence their acts did not affect the realty. We complain that their acts were made to have the latter effect. The decision of the Court below puts it in their power to charge the realty, and they have done so. The case of *Mason's Devisee v. Peter's Administrators*, (1 *Munf*. 437) is conclusive. So far as the ca-

ses cited from *Phillips* apply, they are not disputed ; but how is it to be shewn that *Samuel Osgood* or *Genet* were, in the least, interested ? True, they intermarried with heirs or devisees ; but they could not confess away their wives' rights. *Walter F. Osgood* is, in fact, interested to have the conveyances set aside at the suit of creditors, as it would relieve him from the heavy incumbrances, by mortgage, upon the lands devised to him as one of the residuary devisees. Indeed, he gets nothing by the will unless the conveyances are avoided.

But it is not true, that the confession of one will bind another, because the one happens to be interested. How is this with regard to joint trespassers, who have an equal interest ? Clearly, one cannot confess away the others' rights. So of a promissory note, signed by two jointly ; the admission of one will not charge the other. So the admission of an endorser, though against his interest, is not evidence to charge the maker. (*Hemings v. Robinson*, *Barn.* 436, 3d ed.) But it is said that the confession of one, having a joint interest, is evidence against another having the same interest. If so, you must first shew that such a joint interest exists. This depends here upon the conveyances being void, to establish which the evidence was offered ; and the proposition to admit it is a perfect *petitio principii*. *Mooers v. White et al.* (6 *John. Ch. Rep.* 360) is all fours with this case. The statute of limitations was set up by the defendants, who were executors and devisees ; but the evidence was, that one of the executors, as such, had acknowledged the debt within six years. This was overruled by the Chancellor, as the suit was to affect the real estate. He said, even as to the statute of limitations, that the executor, as such, could do no act to waive it as between the creditor and the heir. (6 *John. Ch. Rep.* 373.) In this case, the evidence was admitted, not merely to take the estate from heirs and devisees, but from grantees. No matter whether the grantee be a child of the grantor, or a stranger. The principle is the same. It is still a question whether an executor can make an acknowledgment having a retroactive effect to take the estate away from a grantee.

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

Again, suppose Mrs. *Osgood* alive. Could she herself confess away the estate granted? No. This is clear, not only upon principle but authority. (*Phoenix v. Day*, 5 *John. Rep.* 412, 426.) Why so? A contrary rule would place the grantee in the power of the grantor at any distance of time, and under any change of circumstances. This is a conclusive answer in itself. In *Arnold v. Bell*, (1 *Haym. Rep.* 397, in note) there was an attempt of this kind. The confessions of the grantor, made after the grant, were offered in evidence; but overruled on the ground that, though evidence against himself, they were not so against any body else. If he cannot make the confession himself, it is very clear that he cannot delegate the power of doing it to his executors.

Even an acknowledgment of record by one joint promisor is not evidence against another. (*Grey et al. v. Palmers & Hodgson*, 1 *Esp. N. P. Cas.* 135.) One co-partner cannot bind another by his confession that they were partners. (*Whitney v. Ferriss*, 10 *John. Rep.* 66) nor by striking a balance after a dissolution. (*Blackley v. Patrick*, 3 *id.* 536-*Smith v. Ludlow*, 6 *id.* 267, 269.) The *King v. Harkwick*, (11 *East*, 578) went on peculiar grounds. A rated parishioner made the confession which was admitted against the parish, and *Ld. Ellenborough* said he was substantially a party to the suit, and it was like receiving the admission of one of an aggregate company or corporation. Even this doctrine has been denied by very respectable authority. (*The President, &c. of Hartford Bank v. Hurt*, 3 *Day's Cas.* 493.) But whether the case cited on the other side be law or not, it has no resemblance to the present one.

The admission of this evidence, then, being erroneous, as observed by the gentleman, a *venire de novo* must issue.

SUDAM, Senator. One of the questions presented for the consideration of the Court, is, whether the petition to the Surrogate by the executors of Mrs. *Osgood*, stating that the personal estate of the deceased was insufficient to pay her debts, and requesting the aid of the Surrogate in the premises, pursuant to the statute, &c. to which was annexed a

statement of her personal effects, sworn to by the executors, was properly admitted by the Judge at the Circuit, as evidence of her insolvency at the time she executed to her daughters the deeds of the lots in *Cherry Street*. This testimony was admitted by the Judge who presided at the Circuit; and his decision was confirmed by the Supreme Court. It now comes to this Court on a bill of exceptions to his opinion on this and other points.

Having myself arrived at the conclusion that this evidence should not have been received, it will be unnecessary for me to consider the other points in the cause.

In order to make out their case, the plaintiffs below were bound to shew affirmatively, that the defendants were the heirs and devisees of Mrs. *Osgood*. To do this, they were compellable to make out, in proof, that the voluntary conveyances to her daughters were void under the statute to prevent fraudulent conveyances, as to creditors, by reason of her insolvency when she executed the deeds; and the petition and schedule were offered as *prima facie* evidence of this.

ALBANY,  
April, 1824.

*Osgood*  
v.  
Manhattan  
Company.

Plaintiffs below were bound to shew affirmatively that defendants were heirs, &c.

It will be recollected that this petition was never acted on; and that the executors declined proceeding upon it, on the ground that they had made it out under a misapprehension. The statement of the debts offered to the Surrogate, did not specify the time when they were contracted; so that we cannot, from this, decide whether they arose before or after the conveyances were executed; and it was made by persons having only an interest in right of their wives, in the premises in question, except *Walter F. Osgood*, who was, in fact, interested to avoid his mother's conveyance.

Petition never acted on. Debts not dated.

Extent of executors' interest.

It is well settled that if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for we cannot say what effect such evidence may have had on the minds of a jury. (*Marquand v. Webb*, 16 John. 89.) This evidence should not, in my opinion, have been admitted, at all, against either the heirs or devisees, admitting that the insolvency of Mrs. *Osgood*, at the time of executing the deeds, rendered them void as to creditors. Upon this point, I do not mean to give an opinion; but the acts

If improper evidence be given, though merely cumulative, judgment will be reversed.

ALBANY,  
April, 1824.

Osgood  
v.  
Manhattan  
Company.

of executors ought not to bind heirs or devisees, unless in the case of an actual decree of sale by the Surrogate. In the present case, too, the executors themselves, after presenting the petition, declined acting upon it. Under such circumstances, especially, the petition and schedule should not be received against the heirs and devisees; and particularly in this case, where it goes to charge them personally with the debt of the ancestor. The form of entering judgment for the plaintiffs below, whether against the lands of the ancestor, or against his land and the person of the defendants, cannot alter our decision.

Judgment a-  
gainst execu-  
tor, no evi-  
dence against  
heir.

Even a judgment against an executor is no evidence against the heir. (*Mason's Devisee v. Peter's Administrator*, 1 *Munf.* 437, 455, 456.) If this is inadmissible against the heir, merely to fix the amount of the demand, upon what principle can it be said that an *ex parte* statement by executors (though under oath) shall be evidence for a much more important purpose; to avoid a conveyance of real estate, and charge the persons and estates of heirs and devisees as upon a false plea.

Grantor's con-  
fession, after  
grant, no evi-  
dence against  
grantee. *A for-  
tiori*, the con-  
fession of her  
executors.

It was the duty of the plaintiffs below substantially to make out their case, before the defendants could be called upon for their defence; and to effect this, it was necessary for them to prove that the conveyances by Mrs. Osgood to her daughters were void. Could this be done by admissions of executors, or any other persons, who were not grantees? I think not. Mrs. Osgood's own confessions, after she had executed the deed to her daughters could not have been admitted. (*Phoenix v. Dey*, 5 *John. Rep.* 412.) And will it be contended that executors, named in her will, can make an admission of more effect than her own? It appears to me this point is settled by the opinion of the late Chancellor in *Mooers v. White*, (6 *John. Ch. Rep.* 360,) and *Arnold v. Bell*, (1 *Hayw.* 397, *note.*)

Confessions of  
one in preju-  
dice of another,  
not receivable,  
unless both  
have a joint  
interest in pos-  
session.

It will be recollected that the conveyances to the daughters were in severalty. There could, therefore, be no joint interest in them till they were avoided. To accomplish this, any acts done by the executors, without the concurrence of the devisees, could not be used as evidence upon any princi-

ple. To warrant receiving the admissions of one in prejudice of another, they must have a joint interest in possession, not a mere community of interest. (*Gray et al. v. Palmers et al.* 1 *Esp. N. P. Cas.* 135. *Hackley v. Patrick*, 3 *John. Rep.* 536. *Smith v. Ludlow*, 6 *id.* 267, 269. *Whitney v. Ferriss*, 10 *id.* 66.)

The case cited at the bar, of the *King v. Hardwick*, (11 *East*, 578,) does not affect the question. There the admission of a parishioner, liable to be assessed for taxes, was received, on the ground that the parish was an *aggregate company* of which he was a member. Beside, I think the ground upon which that case was put very questionable, at least; and I find, that in *Connecticut*, it has been directly overruled as to a corporation aggregate. (*Hartford Bank v. Hart*, 3 *Day*, 493.)

On the whole, I am of opinion that the evidence was improperly admitted; that the judgment must, therefore, be reversed; that the record be remitted; and a *venire de novo* issue from the Court below.

The Court being unanimously of this opinion, it was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be reversed, with costs in error, to be taxed, for the plaintiff in error; and that the transcript be remitted to the said Supreme Court; and that the said Court award a *venire facias de novo*.

SANFORD, Chancellor, being a stockholder in the company, gave no opinion.

PETER THALLHIMER, plaintiff in error,  
against

GEORGE BRINCKERHOFF, defendant in error.

*H. T.*, who claimed land as heir at law of his father, and who was about to commence suits to recover the possession of it, entered into an agreement with the plaintiff, who had married his sister, by which he covenanted in consideration of the premises, &c. to convey to the plaintiff the one fourth part of the property which should be recovered; and the plaintiff, in consideration of such covenant, &c. promised *H. T.* to pay, bear and sustain the one half of all the expenses which might occur

ALBANY,  
April, 1824.

Thalhimer  
v.  
Brinckerhoff.

Whether confession of a corporator is evidence against a corporation.

ALBANY;  
April, 1824.

Thalhimer  
v.  
Brinckerhoff.

in the prosecution of the intended suits, &c. The defendant who drew the agreement, and subscribed it as a witness, as attorney of *H. T.*, and the plaintiff brought actions of ejectment against the persons in possession of the land; and afterwards, by virtue of a power of attorney from *H. T.*, for that purpose, but without the knowledge of the plaintiff, compromised with the tenants, and received from them a large sum of money. In an action of assumpsit for money had and received to the use of the plaintiff, brought by him to recover one fourth part of the money so received by the defendant: *held*, that the agreement between the plaintiff and *H. T.* was valid, and not illegal and void within the provisions of the act to prevent and punish champerty and maintenance, (*sess. 24, ch. 87, 1 R. L. 172*) and that the plaintiff could, therefore, recover against the defendant.

Held, also, that general *indebitatus assumpsit* for money had and received was the proper form of action.

Held, also, that the non-joinder of *H. T.* was no objection.

History of the law in relation to champerty, maintenance and barratry.

It was a principle of the common law that a chose in action could not be transferred; but this is now reversed; though at this day a part of a chose in action cannot be transferred.

The common law rule never prevailed in Courts of Equity.

To maintain the suit of another, is unlawful, unless the person maintaining has some interest, in the subject of the suit, distinct from what he may acquire by the agreement to maintain, or is connected with the suitor in some social relation; but where one has such an interest, whether it be great or small, vested or contingent, certain or uncertain, he may maintain. So where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the latter may maintain.

The relation of landlord and tenant, master and servant, acts of charity to the poor, and the exercise of the legal profession, are also cases in which it is not unlawful to maintain.

The laws against champerty, &c. were intended to prevent the interference of strangers, having no pretence of right in the subject of the suit, and standing in no relation of duty to the suitor.

The above rules and exceptions extend both to champerty and maintenance; the latter being the generic term, including champerty, which is maintenance in a particular form, viz. upon a contract to divide the subject of the suit.

A husband whose wife may, by possibility, be heir of one who claims land, may maintain the suit of the claimant, brought to recover the land, upon an agreement to have part of the land.

ERROR from the Supreme Court, upon a bill of exceptions. Judgment was rendered for the defendant below, who was also the defendant in this Court, upon facts which are, to every material purpose, detailed in the report of the



same cause; as it came before the Supreme Court, (20 *John. Rep.* 386) in *January* term, 1823.

ALBANY,  
April, 1844.

Thalhimer  
v.  
Brinckerhoff.

*S. G. Huntington*, for the plaintiff in error.

1. The agreement between *Teller* and the plaintiff was legal and binding upon the parties. The objection is, that the plaintiff was guilty of maintenance or champerty, by the act of entering into it, and that it is, therefore, void. Maintenance is defined to be an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to the disturbance of the community, by stirring up suits. (4 *Bl. Com.* 134, 135. 3 *Burn. J.* 116. 2 *Chit. C. L.* 233, note (a). 5 *Com. Dig.* 16, *Maintenance*, (A).) Champerty is a species of maintenance, being a bargain with a plaintiff or defendant to divide the land or other matter sued for, between them, if they prevail at law. (3 *Burn. J.* 116. 4 *Bl. Com.* 134, 135. 2 *Chit. C. L.* 233, note (a). 5 *Com. Dig.* 16, *Maintenance*, (A. 1, 2). If a man have any interest in the subject of the agreement about which the suit is to be brought or is depending, this is not maintenance, be the interest never so remote. (*Hawk. P. C. B.* 1, ch. 83, s. 1, 13, 17, 18, 21, 22. *Wickham v. Conklin*, 8 *John. Rep.* 220. 3 *Burn. J.* 117. *Bac. Abr. Maintenance*, (B).)

Here is, we contend, such an interest in the plaintiff as legally entitled him to make this arrangement. *Teller* admitted, by his agreement, under seal, that the plaintiff intermarried with his sister, and had an equitable, though not a legal interest in the subject of the agreement; that this interest in the plaintiff was a consequence of the marriage. No such interest could have been communicated, unless there had been, at least, an equitable one in the wife. Our case, then, is made out by the agreement itself, which must be taken as conclusive between the parties, and upon all claiming under them. (1 *Phil. Ev.* 355, 2d *Am. ed.*)

The plaintiff, then, having an interest, all the authorities agree that he may maintain the action. The extent of the interest is no where made the criterion. (2 *Rol. Abr.* 115. *Bro. Abr. Maintenance*, pl. 7, 14, 17.) Nor is it necessary

ALBANY,  
April. 1824.

Thallhimer

v.  
Brinckerhoff.

that the interest should be vested or certain—a contingent interest is enough. (2 *Rol. Abr.* 117. 1 *Hawk. P. C. B.* 1, ch. 83, s. 13, 14.)

The case states that *Thallhimer* married the sister, not a sister of *Teller*, thus implying, in terms, that she was his only sister; nor is there evidence that he had any other. He having no children, (and it is not shown that he had any) she was the next heir. Being the next heir, or one of the next heirs, her husband had a clear right to contract. Indeed, a mere possibility of future interest is enough. (15 *Vin.* 162, *Maintenance*, (H). 1 *Hawk. B.* 1, ch. 83, s. 13, 14. *id.* ch. 84, s. 19. *Bro. Maintenance*, 15, 18. 1 *Bac. Abr.* 576, *tit. Champerty*. 2 *Inst.* 563-4.)

2. But if the agreement were illegal, the defendant cannot take advantage of it. *Teller*, having acted under the agreement, has no right to object; and if so with him, it is the same with the defendant, who acts under him, and is bound by the relation of attorney. He can do nothing except what *Teller* authorizes him to do. Suppose that, at the Circuit, the defendant's counsel had set up the statute of limitations, but the defendant himself had risen and told them to waive this, and declined all advantage from it; would not the counsel have been bound by his acts? Certainly. To defend upon such ground, they must maintain an authority to do it, derived from their client. So with the defendant here. He should have shewn that his client authorized him to withhold from us our just due upon the agreement; that *Teller* objects to our recovery, and authorizes him to do so. He, for aught that appears, is willing that we should have the full benefit of the arrangement. There is no evidence that *Brinckerhoff* ever settled with him. The inference, in the absence of proof to the contrary, is, that he is perfectly willing to do us justice.

3. The money received by the defendant was, as to one fourth part, received by him to the use of the plaintiff.

*H. Bleeker & A. Van Vechten*, for the defendant in error, made the following points: 1. That *Henry R. Teller* should have been joined with the plaintiff in the action. (*Ziele v.*

*Exrs. of Campbell, 2 John. Cas. 382.*) 2. An action of assumpsit cannot be sustained for the money claimed by the plaintiff, because, by the agreement between Teller and him, the plaintiff was to have one fourth of the land, not the money received for it. The *casus fæderis* between the parties never occurred. 3. The agreement was void, within the statute to prevent champerty and maintenance, and the plaintiff can derive no right of action from it against the defendant. 4. The plaintiff ought to have proved notice to the defendant, to pay the proportion of the money claimed.

It is true, the 1st, 2d and 3d points were not expressly made at the Circuit ; but we have a right to present them here ; especially those which it is plain could not have been obviated by any additional proof. (*Beekman v. Frost, 18 John. 544.*) This is clearly so with the objection of the non-joinder, and the form of the action, being for money instead of the breach of the special agreement. Both of these objections arise from the nature of the transaction.

The third point is the principal one. As to this the defendant was not put upon his defence. It is said, he should have proved this and that ; but the obvious answer is, that he had no chance to prove any thing. The cause was arrested upon the insufficiency of the plaintiff's proof ; and it would be unreasonable to infer any thing against the defendant, for lack of evidence, which the Circuit Judge pronounced to be idle and unnecessary.

The agreement was void. The statute, (1 R. L. 172, s. 1) provides, that no officer or other person shall take upon him any business that is or may be in suit, to have any part of the thing in plea or demand ; and no person, upon any such agreement, shall give up his right to another ; and every such conveyance or agreement shall be void ; and every person who shall maintain any plea or suit in any Court, for lands, &c. to have part or profit of them, shall be punished by fine and imprisonment ; but this act shall not prohibit any person to have counsel of persons duly licensed, or of his parents and next friends. We rely upon these provisions. The other sections of the statute provide against buying titles, and simple maintenance. The latter is mere-

ALBANY,  
April, 1824.  
Thallhimer  
v.  
Brinckerhoff.

ALBANY,  
April, 1824.

Thalhimer  
v.  
Brinckerhoff.

ly aiding another in a suit. Champerty is where a man agrees to maintain the suit, upon condition to have part of the thing in dispute. This was the view taken of the subject in *Jackson v. Ketchum*, (8 *John. Rep.* 479.) The Court say, the established doctrine is, that a purchase, or even gift of the land, while a suit is pending concerning it, if it be made with a knowledge of the suit, and be not the consummation of a previous bargain, nor founded on the ties of blood, is within the purview of the statute. An agreement, in contemplation of a suit, is equally void as if it had been the consummation of a contract founded in maintenance. This is obvious from the words of the statute, as cited and commented upon in the last case. If the agreement relate to what is or *may be* in suit, it is void. The Court adopt the ancient doctrine, in its full extent, and say that our statute is even more explicit, in avoiding the agreement, than the old ones, of which it is a transcript. (*West. 1, ch. 25, 28, 49, and 28 Ed. 1, ch. 11.*)

It was said, in the Court below, that here was no adverse possession; but this is immaterial. Even if *Teller* had been in possession himself, a defendant in ejectment, or expecting to be a defendant, it is plain, from *Jackson v. Ketchum*, the agreement would have been void, as an act of champerty. The statute forbids one taking upon himself any thing in plea or demand; and the present is the very case within its contemplation and its terms. You could not illustrate the offence in plainer and stronger language than is presented by the bill of exceptions. The agreement looks to an adverse possession, if this were necessary. Suits were to be brought for the purpose of getting into possession. These would have been unnecessary had there been no adverse possessors of the land. Had the possession been in acknowledged subserviency to *Teller's* title, there would have been no sharing of expense in order to vindicate the right. But, we repeat, it is enough that the business was, or might be in suit, and that the plaintiff was to have a part of the thing in demand. No explanation, however, was offered, to take the case out of the statute. If adverse possession be an ingredient of the offence, why was it not negatived by proof at

the trial? If suits for the recovery were not necessary, why was this not shewn?

All that has been set up in vindication of the agreement is, that the plaintiff intermarried with the sister of *Teller*, and thus acquired an equitable interest. It is true, that a certain interest would take the case out of the 9th section of the statute, which relates not to champerty, but maintenance. But even if this be holden maintenance, here is no such interest as will form an exception. *Wickham q. t. v. Conklin*, (8 *John. Rep.* 220) cited on the other side, was a case of mere maintenance; and an exception was allowed. This was on the ground that the defendant, *Conklin*, was a *cestuy que trust* of the land in dispute, and prosecuted for his own benefit. He had a plain, defineable, equitable, subsisting interest, which might be enforced. Not so here. *Thallhimer* had no right but what he was to acquire by force of the agreement itself. It is said, this admits the wife's interest. Not so. It admits the facts stated in it; and these show no interest whatever. Does an admission that *A* is the sister of *B* shew her to be his heir? The amount of the admission in the agreement is, that she had a just right, not equitable. Had it stated an equitable right as the consequence of the relation, the conclusion would have been false. How could Mrs. *Thallhimer* ever have enforced a right growing out of these circumstances? *Teller* is admitted to be the heir at law. It appears his father died before the statute of descents, and he was the sole heir, being the eldest son. A Court of Equity could not assist her. The interest is altogether ideal and intangible. The right to real estate is settled by the law, and there can be no right not founded on this basis. The law can draw no conclusion of right from such premises as are stated here, and the inference sought for has nothing to support it. Suppose a man attempts to devise land by an instrument attested by two witnesses only; could it be pretended, that the devisee had any equitable or legal right? His friends might think so, but the law would treat him as a perfect stranger. (2 *Bl. Com.* 13.) It would never allow an exception which could be satisfied by the mere fancy of the claimant, but refers to such

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

an interest, only, as itself would recognize and enforce ; otherwise its provisions might be evaded at pleasure. If Mrs. *Thallhimer* had such a right as the law acknowledges, on the ground taken, that she might possibly inherit, uncles, cousins, &c. come within the same rule. All the relations may possibly inherit. Would this remote chance entitle them to bring suits for the land ? A defendant may thus lie at the mercy of a whole community of relations, bringing suits upon an agreement to divide the spoil. Indeed, the moment you go beyond the heir, you launch beyond all rule, and virtually repeal the statute. Then if the interest does not take the case out of the statute of maintenance, (the 9th section) *a fortiori* it will not out of the statute of champerty, (the 1st section.)

Does the case come within the exception in favour of licensed counsel, or parents, or next friends ? (1 *R. L.* 172, s. 1.) Does taking counsel excuse the buying and selling, or contracting to have part of the thing in dispute ? The enacting clause prohibits this to all, including counsel and friends. Among all the authorities cited, there is but one which mentions an exception in the case of champerty, where the thing may be conveyed. That is 1 *Hawk. B.* 1 ch. 84, s. 19. This was cited and relied on by his honor Judge *Woodworth*, who dissented from the Court below. (20 *John. Rep.* 401.) And if this be law, it is against the plain terms of the act. *Hawkins* is writing under the general head of maintenance, of which he treats champerty as a subdivision ; and this section 19 is the only one in which he has mentioned such an exception under this head. He cites *Ld. Coke*, and all that he says is taken from the *Year Books*. The two offences of champerty and maintenance may have been confounded in this single instance ; for certainly other authorities are plainly to the contrary. It has been repeatedly decided under the English statute, that even attorneys or counsel cannot agree to have part of the thing about which they are litigating as a compensation for their services ; and why not so as to a next friend. Indeed his advice must always be entirely gratuitous. He cannot take fees. Why not the same in one case as in the other, as to sharing

the spoil? Both are placed on the same footing by the statute of maintenance, and both are, in terms, shut out by the statute of champerty. The exception cannot be extended by construction. But, most likely, when *Hawkins* makes this exception of the son, he must mean the heir. Thus the 2 *Inst.* 564, upon which he relies, says, "In like manner, and by the like reason, if the father be demandant in a *præcipe*, he may promise and contract with the son to secure him the land after the recovery, and is not any champerty within this act, and so of any other ancestor and his heir apparent." It is plain that *Coke* means heir, or why should he add, "so of any other ancestor, or heir apparent?" In *ch.* 88, s. 13 & 14, *Hawkins* speaks first of remaindermen and reversioners, having a vested interest; or an interest which it is in no man's power to deprive them of; and he concludes, "therefore, an heir apparent, or the husband of such heir may maintain the ancestor." Is it not fair to conclude that here, also, when he speaks of an heir, he means one who has a vested interest as heir? The Chief Justice who delivered the opinion of the Court below, understands Lord *Coke* to mean, merely, that the pendency of a suit shall not prevent a father making provision for his son out of the thing in demand.

If the exception be not limited to the heir apparent or presumptive, we ask, again, where are you to stop? The whole range of kindred may maintain suits with impunity. To whom did it belong to shew that Mrs. *Thallhimer* was heir apparent or presumptive? It does not follow from her being the sister of *Teller*. The agreement does not make out even this plausible case. For aught that appears, other persons were heirs of *Teller*. One fourth is to be conveyed; but how does it appear that *Thallhimer* had an interest in this, or any other portion? We mention this to shew that the estimate of interest was merely arbitrary; that the sister had no real interest. When the heir is allowed to maintain, this relates to the subject of his immediate expectancy or descent. If Mrs. *Thallhimer* had any interest, instead of being promoted, it was cut off by the agreement. The land would have gone to her; but this agreement turns it over

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

ALBANY,  
April, 1824  
Thallimer  
v.  
Brinckerhoff.

absolutely to her husband, leaving her a mere contingent interest in one third of this fourth, as dowager. It is evident that all this language, relating to her interest, was inserted in the agreement colorably to avoid the statute. All the authorities cited against us, perhaps with the single exception we have mentioned; relate to maintenance. The 1 *Hawk. ch. 83, s. 20*, says, "one cannot justify laying out his own money in the cause, unless he be either father, or son; or heir apparent to the party, or the husband of such an heiress;" though the same section agrees, that a remote relation may stand by and counsel at the bar. This is to the same effect as the 14th section of that chapter: It is said that a contingent interest is enough. What this contingent interest must be, will appear from sections 13 and 14 of the same chapter. The contingency must be such as is settled and fixed, when the event happens; and the heir, alone, is an exception to this rule. True, it is said, in 15 *Vin. 162, (H) pl. 9*, that a brother may maintain, but the reason is given, viz. because he is heir presumptive. Accordingly, the same book says, a brother of the half blood cannot, because there is no immediate possibility of his inheriting. (*id.*) The distinction between an heir apparent and presumptive will be found in 2 *Bl. Com. 208*. The authorities in 15 *Vin. Abr. 168, (O) pl. 9*, and *Br. Maintenance, pl. 18, p. 74*, and elsewhere, must be understood in reference to one of these heirs, when they say that the husband of a cousin who may be heir has a right to maintain. This relates to a cousin who is heir presumptive. Could a father maintain the suit of his son-in-law? Beside, these cases mean maintenance properly so called, and as contra-distinguished from champerty. The section quoted by Mr. Justice Woodworth, in the Court below, (1 *Hawk. B. 1 ch. 83, s. 20*) will be seen not to embrace the present case.

The maintenance was not in consideration of the relationship of these parties, but of the land. It was matter of profit on both sides. We deny that even heirs may contract in this manner.

Then, if Thallimer had a right to maintain within the authorities, they will not justify him in this act of champerty;



and though the Court might not punish him criminally, for thus leaguely to vindicate even a fancied right of his own or his wife's, they will declare the agreement void.

ALBANY,  
April, 1824.  
Thalhimer  
v.  
Brinckerhoff

We may be told in the language of *Buller, J.* in *Master v. Miller*, (4 *T. R.* 340) that our doctrine is harsh ; but this is a subject for the legislature. The language there does not apply. It related to an assignment of a chose in action, and the question was of maintenance, not champerty.

It is said the right to object does not lie with the defendant ; but we answer, the agreement is void within the express terms of a statute ; and being so, it is as no agreement. Even a party may make the objection. *Teller* himself might do so ; and, *a fortiori*, his agent. The ground and policy of the objection is, that the agreement is unlawful and criminal, and even if *Teller* has consented that the defendant should hold the money to the plaintiff's use, this will not legitimate the transaction, and render that good which was corrupt and void in the beginning. This would enable the parties to repeal a statute. That the defendant may object, we cite *Whitaker v. Cone*, (2 *John. Cas.* 58,) *Belding v. Pitkin*, (2 *Caines' Rep.* 147,) and *Hunt v. Knickerbacker*, (5 *John. Rep.* 327.) It is clear that the plaintiff could never have recovered the land. Then how can he recover the money ? In addition to the authorities already cited to this point, and which were referred to by the Chief Justice in the Court below, we rely on *Biggs v. Lawrence*, (3 *T. R.* 454 ;) *Clugas v. Penaluna*, (4 *id.* 466 ;) *Morck v. Abel*, (3 *B. & P.* 35.) No act or contract in contravention of law can be made the foundation of an action.

*S. Jones*, in reply. I stand here to vindicate a contract made in perfect good faith, with a professional gentleman, the legal agent of the plaintiff ; and which has been acted under for a number of years. He was the common attorney of *Teller* and *Thalhimer* ; as such he has received their money respectively. He claims to withhold it ; and unless there is some unbending law to which morality itself must yield, I trust we shall recover. The land to be recovered

ALBANY,  
 April, 1824.  
 ~~~~~  
 Thallhimer
 v.
 Brinckerhoff.

belonged to the common ancestor of *Teller* and his sister; and both had a fair and equitable right to it. It is true that *Teller* might have maintained the action alone; but in the prosecution of the contemplated suits, the names of all the ancestor's children might also have been used. Instead of taking either course, money was received for the land expected to be obtained. We affirm the transaction, put ourselves upon the Court and jury, and shew a plain right, unless the agreement is impeachable upon the ground of legal invalidity. How does *Brinckerhoff* defend himself? By shewing that he has accounted for the money? There is no pretence of this. After having acted under the agreement, his counsel object that it is illegal; and a majority of the Court below have sustained the objection. Convinced that the dissenting Judge was right, we bring our writ of error.

We are met at the threshold by several preliminary objections. One is, that the action should have been in the joint names of *Teller* and *Thallhimer*. But even if they had been partners, and the party, as here, omitted to take advantage of the non-joinder, either in pleading or at the trial, we might have recovered in severalty. This is clearly the rule as to joint defendants, who must plead the non-joinder in abatement; and it is the same in regard to the plaintiff, where there is a total omission to object. The defendant was properly met by this answer in the Court below. Even if the action should have been joint, on the face of the bill, yet if the objection had been made at the circuit, it might have been obviated. We might have shewn that the defendant had settled with *Teller*, reserving the money for which we sue, in his hands for our use. This would have been a severance. But the parties have separated their rights by the terms of the agreement. *Thallhimer* was to have one fourth—*Teller* three fourths; and the suit could have been brought in no other form. The action for money had and received is an equitable action, favoured by the Courts; and not to be defeated by the technical rules applicable to many other actions.

We are also told, that the money was not received in pursuance of the agreement; that this embraced land only,

and the *casus fœderis* has not occurred. This goes to the merits of the case. If *Teller* could, by a separate power, defeat our agreement, then, it is true, we cannot recover at all. But how is this? Suppose *Teller* had recovered the land, and afterwards sold it in defiance of our right; if the agreement be valid, should we have no remedy for the money? Will gentlemen deny a position, so well known to the law, that in such a case, the money would be substituted for the land? that we might affirm the sale and recover the money received upon it? The present is that case. By this act of sale, *Teller* is made our debtor. So of *Brinckerhoff*, the actual receiver of the money. True, we might have disavowed the act, and proceeded against *Teller* upon the special agreement; but we had, also, a right to affirm it, which we do by prosecuting our action in this form. *Brinckerhoff* is discharged from the claims of *Teller* by our recovery. If he had liens upon the money, this should have been shown. His fair credits would have been allowed.

ALBANY,
April, 1824.

Thalhimer
v.
Brinckerhoff.

It is said we were bound to give him notice. Of what? Not to pay the money over to *Teller*? This would have been so provided he had paid it over; which is not pretended. There was no use in giving notice. Had he paid over without this, I admit we should have been driven to our action against *Teller*, the principal.

But all these formal objections were clearly answerable at the trial by other evidence. The case cited from the 18 *Johnson*, therefore, does not bear gentlemen out. It is of an objection which goes to the whole ground of action; and which, on its face, is final, conclusive and unavoidable by any possible explanation.

The only objection taken, was, that the agreement was void. This is fairly before the Court; and I shall proceed to consider it. This agreement recites that *Teller* was heir to the lands described, his intention to sue for their recovery, that the plaintiff intermarried with his sister, who was justly entitled to a part of them, though not legally. Now, were all these recitals true, or does it lie with our own agent, who has acted under them to de-

ALBANY,
 April, 1824.
 ~~~~~  
 Thallhimer  
 v.  
 Brueckerhoff.

clare them false ? If true, *Thallhimer* had, by the intermarriage, a just right to a part of the land. It is said, if *Teller* was sole seised, then *Mrs. Thallhimer* could not be entitled in any way ; but is this so ? Suppose the land held adversely at the death of the ancestor, who made his will devising one fourth to the sister ; but which could not take effect on account of the adverse possession : would she not be entitled, in the language of every man ? And would not the heir to whom the right should descend, be a scoundrel for withholding it ? Might not such a claim be called just ? And would not its justice be recognized by the law ? Would an agreement to perfect such a right, by a fair course of litigation, deserve the epithet of injustice or corruption ? Would it be void in law ? If so, law is not morality. We have, I think, presented one case of just right, though without strict legal title. Suppose others : that the ancestor had died in possession having made a will which is lost ; that *Teller* the heir knew this fact ; but as the document was gone, nothing remained to shew the right : or suppose the heir at the death bed of his father, who declared, in the hearing of all his children, that he intended his land for them equally ; or suppose the ancestor died the day before an act passed altering the course of descent from the eldest son to the children in equal moieties, by which the whole descends according to the ancient rights of primogeniture : the next day, the legislature declare the old rule partial and unjust ; shall it be penal for parties to use the same language, in either of the cases supposed, and make arrangements to be at a joint expense in the prosecution of such a right, technically belonging to one, but justly to all ? Here is the last case precisely ; an honest attempt by *Teller* to carry the provisions of our statute of descents into effect. He made a law for himself, in order to do an act of justice to his sister. Having the whole right, and entitled to the several possession, he treats with his brothers and sisters. The recovery required expense ; was it right that he should pay the whole ? No. Accordingly, the sister assumes the proper share of expense, and he puts the whole on the same footing as if it had descended in common. For aught we know, the same agree-

ment was made with other brothers and sisters of the family. Is this agreement, then, subject to the criticisms which have been made upon it? When you look at an agreement with a view to its construction, you must take it as it is. The strongest consideration must have been that of consanguinity. Why give one fourth of \$50,000 for one half often or a dozen lawsuits? The distinction attempted to be drawn between the husband and wife is without foundation. In law they are one. We are to intend that the compromise was for less than the value. Would *Teller* have made such an arrangement with a stranger? He would have found men enough who, if the agreement had been lawful, would have assumed the same responsibility for  $\frac{1}{16}$  of the land. The rights of primogeniture have been declared unnatural and unjust, by a statute, almost the first which passed after the declaration of independence. The contract was to equalize the land. Does it contravene the law as it stood at the time?

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

The 1st and 3d sections of the statute of champerty, &c. (1 R. L. 172-3) are relied upon as embracing and avoiding the agreement. If you take the words of the first section, in their broadest sense, and take a case where the bargain turns upon the consideration of having a part of the thing in demand, without any other motive, it might be void. But is this so, if any other motive be mixed with it? To bring the case within a statute so highly penal, must not the agreement be an act founded upon the naked consideration of a part of the thing in demand? Must not maintaining be the sole ground of the part received? If not so, the motive takes away the guilt. What was the evil intended to be remedied? I cannot express this better than was done by Mr. Justice *Woodworth*, who dissented from the judgment below, and I, therefore, refer the Court to what he says, (20 *John. Rep.* 400.) The act was levelled against strangers, not relatives, either by interest or blood. It was aimed against intruders, or, to adopt the language of the old act itself, against impertinent intruders. It never was intended to restrain the son from protecting the father, or the brother from advocating the cause of the brother. I appeal to the

ALBANY,  
April, 1824.

Thalhimer  
v  
Brinckerhoff.

language of Mr. Justice *Buller*, in *Master v. Miller*, (4 T. R. 340.) "It is curious, (says he) and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received in *Westminster Hall*. At one time, not only he who laid out money to assist another in his cause, but he that, by his friendship or interest, saved him an expense which he would otherwise be put to, was held guilty of maintenance. (*Bro. tit. Maintenance*, 7, 14, 17, &c.) Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpoena, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. (2 *Roll. Abr.* 115.)" There may have been some reason, in early times, why these statutes should have been so construed; for in the reigns when they passed, it was not unusual for Lords to buy up contested claims against each other, or against commons, when at variance with them, with a view to persecute and oppress the farmers of the country, and others. Very soon, however, exceptions were introduced. The first was interest. If you take the strict words, they embrace every one, whether interested or not. Yet this exception was well established soon after the passage of the act. On this head, the series of cases is unbroken; and when we passed the statute we adopted the exception. The very definition of the offence, which implies an officious intermeddling, and which was the evil intended to be remedied, precludes the operation of the statute. In some of the books the definition is stated to be an officious act of maintenance, not warranted by the interest of the party interfering. In *Wickham v. Conklin*, (8 *John. Rep.* 220) this distinction is recognized. The case decides, that one having an interest cannot be guilty of maintenance. Where is the origin of this exception? There is none in the words of the act; yet it is universally acknowledged to exist. Upon what authority do gentlemen deny us the right to go beyond the

words of the act? With what consistency do they deny this, and at the same time admit their exception? It is not confined to maintenance. It extends to champerty. It embraces both offences. You are never guilty of either, when the inducement is to protect your own interest, and the contract is not a naked one to defray expenses, and have a part of the thing in demand. An opposite construction is at war with the strongest principles of human nature. This induced the Courts to make the exception.

The exception founded upon considerations of blood, depends on the mixed principle of interest and affection. A relation may, by possibility, inherit; and we have cited various authorities where this is enough. In 15 *Vin. Abr. Maintenance*, (H), it is said, "Some books say, generally, that a man may maintain his blood, (9 *H.* 6, 64;)" that is to say, all who are of kin to him. Again: "So it is of him to whom the land may descend, (19 *E.* 4, 3, b.)" And several corresponding instances are put under the same head, (I). Reference is made to the *Year books*, whence the doctrine has been handed down to us unimpaired. The distinction in the *Year books* is not in favour of the heir apparent only. It is general, that a parent may maintain for his son; but a brother, of the half blood, cannot maintain his brother. Why? Because he is considered a mere stranger. The exception does not exist as to him, because he cannot, by any possibility, inherit.

It is said, our authorities mostly relate to maintenance. Be it so. What is champerty? A species of maintenance, which latter is the generic term. *Hawkins*, (B. 1, ch. 83, s. 2, 3) defines maintenance to be of two kinds, *ruralis*, or *curialis*; and he includes champerty, in terms, as being one of the subdivisions of the second head. Every case, therefore, applying to one species, applies also to the other. There is no substance in the distinction; and though, it is said, the first section, concerning champerty, embraces every body, it is the same of the 9th section, which relates to other kinds of maintenance. An offence under one section, would be subject to the same rules as one under the other.

ALBANY,  
April, 1824.

Thallbimer  
v.  
Brinckerhoff.

ALBANY,  
April, 1824.

Thalhimer

v.  
Brinckerhoff

Indeed, the 9th section is more general and comprehensive than the first.

The two cases cited by his honor, Judge *Woodworth*, from *Viner*, obviate the objection that the contract was with *Thalhimer*, instead of his wife. Her right to maintain is transferred to him, and continues in him, so long as his interest is continued by the marriage, or a tenancy by the curtesy. Indeed, it has become an axiom, that any one having an interest may maintain; the ground of which is, that it would be absurd for a statute to deny one the right of protecting his own property.

It is said, this must be a certain and definite interest, such as the law will enforce. But what kind of interest is that of the heir apparent or presumptive, which gentlemen admit forms an exception? The law will no more protect his interest, than it will that of the most remote expectant. His interest may be defeated by the ancestor at any time. A vested right, then, of which gentlemen speak, is not the only exception; nor is the certainty of the right the principle upon which it depends. Why is not our rule, that kindred shall be excepted, equally certain? We all know what the word kindred means. It is a *good* consideration, as contradistinguished from a valuable one, and every lawyer knows, that a deed, which would be void to a stranger, would be good between kindred. Courts act upon this distinction every day. Counsel advise upon it. You have only to inquire whether the parties are related. Acting upon such a rule would not, as gentlemen apprehend, repeal the act, unless you find a man related to all the world. Why should not a brother or uncle aid his brother or nephew? Must one stand by and see his relative stripped of his estate? He has a chance of inheritance which may become absolute the next day. The Court, in *Williams v. Conklin*, (8 John. 230) sanction this distinction.

But how does it appear that *Mrs. Thalhimer* is not, at least, heir presumptive, admitting the necessity of shewing her to be so. Who is she? The sister of *Teller*, the owner. If he have no children, she is heir presumptive, though he may have other brothers or sisters. In the absence of



ALBANY,  
 April, 1824.  
 Thallbimer  
 v.  
 Brinkerhoff.

Other proof, is it not fair to presume that she is heir presumptive? It lay with the other party to impeach the agreement, by shewing that she was not so.

But it was enough that she was the sister, and, consequently, of the blood of *Teller*.

It was asked, suppose the father had attempted to devise to her by a will imperfectly witnessed, would it be lawful for her to maintain the suit of the heir, upon a contract to have part? I answer, unhesitatingly, yes. A Court, I trust, will never be found to restrain an heir from perfecting such an imperfect will, by carrying into effect the lawful intent of the testator. It was asked, may a father maintain for his son-in-law, in consideration of part to be recovered. I answer this question, also, in the affirmative. The books agree that he may maintain for his son; and it follows that he may for his son's wife, in whose estate the son is interested. So of the daughter's husband.

Again: the saving in the first section of the statute, in favor of counsel, parents and friends, extends to this case. To determine this construction we must refer to the authorities, and we ask no better, for this purpose, than the one cited on the other side. (2 *Inst.* 563, 564.) Lord Coke there speaks of *prochein amyes*. The statute means not merely counsel, but aid and assistance. It would be idle for it to except mere *advice*, whether of counsel or friends. Hence the cases make a distinction between legal counsel and the *aid* of friends. Gentlemen put the case, that counsel cannot take part of the thing in controversy; but they wrongly infer that it is the same of friends. The opposite is the fair inference; and this accords with the opinion of the Court below. They cite the 2 *Inst.* 564, which declares, that though the father be impleaded, he may enfeoff his son, for his assistance, maintenance and comfort; for this is nature's profession. What is the meaning of this exposition, but that though counsel may not take part, yet the son may. He may *enfeoff*, &c.; that is, he may convey part in consideration of the son's aid. The language of the exception in the act is, *next friends*; and the *father* is included in the words of the exception by way of example merely. The law of nature, as

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

*Coke* says, makes it the duty of relatives to support each other. Why did the act make the exception, if it meant merely counsel. It is made in the very statute which speaks of taking a part of the thing in demand. This act was framed from a variety of old statutes, by searching which, it will be observed that this exception is attached immediately to a clause prohibiting champerty. The original act was express, that one might take counsel of a pleader for his fee, or of his next friends. (*Artic. super chart.* 28, *Ed.* 1, *ch.* 11.) The offence is, taking a part of the thing in demand. The exception of the advice of friends would be an idle exception. Our construction is, that you are not only at liberty to advise with your friend, but to give him a part of the thing in controversy. The terms giving liberty to take counsel allow this. It is the officious intermeddling that the statute intended to guard against.

I ask a case, in the whole round of 300 years, where a relative was ever prosecuted for maintenance. I challenge the production of any case of champerty in a near relative; and I do hope the decision of this Court will restore the rule as we contend for it—a rule which the case in the Court below has, for the first time, broken in upon. The father may maintain the son, and yet, by the English law, the estate would escheat before he could inherit it.

But let the agreement be what it will as to other persons, *Brinckerhoff* cannot object to it. I seek not to enforce a contract null and void; but the defendant, a professional man, understanding his rights perfectly, has admitted every thing necessary to make out a complete case against him. He knew, professionally, that the act was not one of champerty. He went on, and instituted suits under the agreement, as attorney of *Teller* and *Thallhimer*. The agreement did not consider the suits certain. For aught the parties supposed, the lands might have been surrendered on sight of the title. The recital, that *Thallhimer's* wife being *Teller's* sister, she was, therefore, in justice entitled, is conclusive upon the defendant, in whose mouth it does not lie to say there was no interest except what arose out of the contract. He recites, it is true, that she had no legal interest,

that is, not the legal title. It is enough that she had a just one. Who can say, that by some act of *Teller's* own, even prior to the marriage, he had not made her interested. I am speaking of the defendant's acts ; his declarations in the agreement, of which he cannot deny one word. He admits a previous interest acquired by marriage. If so, it must have subsisted before the agreement ; and the Court will intend, as against him, that some act was done by which an interest was lawfully conferred. Then it comes to this : two parties having an interest in certain property, the legal title to which is vested in one, agree, that when the property is recovered it shall go to both, according to their respective rights. It is the duty of the Court to seize on every intendment in favor of sustaining an agreement, such as this, made between near relations.

ALBANY,  
April, 1824.

Thallbimer  
v.  
Brinckerhoff.

THE CHANCELLOR. Champerty, maintenance, and barratry were defined as offences, in very early stages of the English law. These practices seem to have been then common in England ; and they were denounced not only as sins very heinous in themselves, and highly injurious to the peace of society, but also as offences which actually interrupted the course of public justice. The excitement of suits is an evil, when suits are unjust ; but when right is withheld, and the object of a suit is just, to promote the suit, is to promote justice. That a resort to the public tribunals for justice, should produce injustice, can be true, only where the administration of justice is weak or corrupt, or where the laws are very imperfect. Where the administration of justice is firm, pure, and equal to all, and where the laws give adequate redress for groundless suits, it is not easy to conceive, that mischief can arise from opening the courts of justice to all suitors, or from contracts by which the fruits of a suit may be divided between him who has the right of action, and him who has contributed advice, expense or exertion, to institute the suit, or prosecute it to effect. The right of litigating, may be abused ; and proper remedies for groundless and vexatious litigation, must exist : but the remedies for the abuse of this right, should be such as not to impair the

Origin, progress and changes of the law in relation to champerty, maintenance and barratry.

ALBANY,  
April, 1824.

Thalhimer

v.  
Brinckerhoff.

free use of the right itself. As the justice, or injustice of the claim can not be known before the termination of the cause, the checks upon unjust litigation, must in general, consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice, upon the merits of the cause.

The civil law.

The Roman law, by its provisions for preventing groundless and vexatious suits, required, that the plaintiff should take an oath, that the suit was not commenced from malice, and that he believed his cause to be legal and just. The defendant was required to swear, that in his belief, the plaintiff had no just claim. The advocates on both sides, were required to take similar oaths. If the plaintiff failed in his suit, he was fined in a sum, which was sometimes a tenth part of the demand; and in cases of great malice and vexation, the plaintiff was farther punished by a decree of ignominy. Inst. book 4. tit. 16. Code, book 2. tit. 59. Dig. book 5. tit. 1. 79. Inst. book 4. tit. 1—33. Huber. *Prælect.* 457. 1478. Wood's Civil Law, 341.

The English doctrine of maintenance arose from causes peculiar to the state of the society, in which it was established. The great reason for the suppression of champerty and maintenance, was an apprehension, that justice itself, was endangered by these practices. Blackstone, 4 Comm. 135, speaks of this offence, as perverting the process of law into an engine of oppression. In the case of *Slywright and Page*, 1 Leon. 167, it was said by the whole court of common pleas, that the meaning of the statute of the 32 H. 8, concerning maintenance, was "to repress the practices of many who when they thought they had title or right to any land, for the furtherance of their pretended right, conveyed their interest in some part thereof to great persons, and with their countenance, did oppress the possessors." The power of great men, to whom rights of action were transferred, in order to obtain support and favor in suits brought to assert those rights; the confederacies which were thus formed; and the oppression which followed from the influence of great men, in such cases, are themes of complaint, in the early books of the English law. While the

power of nobles and great men was felt in the administration of justice, these practices seem to have produced real and great evils. In that state of things, instead of invigorating and purifying the administration of justice, as the direct remedy for such evils, the laws concerning champerty and maintenance were established, as penal regulations intended to operate upon the parties to these transactions.

In modern times, and since England has enjoyed a pure and firm administration of justice, these evils are little felt; and champerty and maintenance are now seldom mentioned, as occurring in fact, or as producing mischief in that country. The statutes for the limitation of actions, the statute of frauds, the extension of the action for malicious prosecutions, and the costs given against unsuccessful parties, have all taken place since the law of maintenance was established; and all these alterations have contributed to prevent or punish groundless and vexatious litigation.

It was a principle of the common law, that a right of action could not be transferred by him who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that justice would fail, and oppression would follow, if rights of action might be assigned. "Nothing," says Coke, Co. Lit. 114. a.; "nothing in action, entry, or reentry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." Feeble, partial, and corrupt, must have been the administration of justice, where such a reason could have force. In early times, this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole, or in part. Hence the doctrine of maintenance which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. But the rule of the common law, that rights of action can not be assigned, has in modern times been reversed; the apprehension, that jus-

ALBANY,  
April, 1824.

Thalhimer  
v.  
Brinckerhoff.

By the common law, a right of action could not be transferred;

But this rule has, in modern times, been reversed.

ALBANY,  
April, 1824.

Thallhimer  
v.  
Brinckerhoff.

In the courts  
of equity, it  
was never fol-  
lowed ;

tice would be trodden down, if property in action should be transferred, is no longer entertained ; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity, this rule was never followed ; and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shewn, not only, that no evil results from the assignment of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession

And though  
now the same  
at common  
law, as to an  
entire right of  
action, yet a  
part can not  
be transferred.

The general law, both in England and here, now is, that rights of action may be transferred ; and as the laws concerning maintenance are still in force, the present state of the law is, that while an entire right of action may be transferred to a purchaser, with complete effect, a contract to transfer a part of a right of action, is void. The primary rule forbidding the assignment of a right of action, has ceased ; but the auxiliary sanction concerning the assignment of a part of such a right, remains in force. The English judges feeling that the original reasons for the law of champerty and maintenance, had ceased, have gradually mitigated that law, by interpretations and exceptions ; and the present state of English opinion on this subject, may be seen in 4 D. & E. 340, 341 ; where Buller justice, expresses himself in terms which do not disguise his contempt for the whole doctrine of maintenance.

In many of  
the U. States  
the laws a-  
gainst cham-  
perty, &c. are  
not in force.

In many of the states of this union, these laws are not in force ; and the want of them, is said to be no inconvenience.

These observations are made to show, that in examining the English law, and English authorities concerning champerty and maintenance, we must, in order to ascertain the sense and extent of their doctrines, bear in mind the state of society which produced them, the evils for which they were intended to afford a remedy, and the different state of things, to which they are now applicable. It is only by this recurrence to history, that we can trace the true reasons of the English law ; the causes of the horror with which the

maintenance of suits was viewed in early times ; the decline and fall of the rule of the common law, that things in action were not vendible ; and the different views, which at different times have had influence upon the judicial expositions of the law of maintenance, in England.

Our statute concerning champerty and maintenance, is a compilation of the several English statutes relating to the same subjects ; and it declares certain contracts void. This statute throughout, makes or supposes, a distinction, which before prevailed in the rules of the common law, between maintenance which is innocent, and that which is unlawful. To maintain the suit of another, is unlawful, unless the person maintaining, has some interest in the subject of the suit, or unless he is connected with the suitor, in some social relation. These are the exceptions to a general rule ; and they are exceptions which rest upon the strongest ground of reason, as well as the support of authority.

Where the person promoting the suit of another, has any interest whatever in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect, also a suitor, according to the nature and extent of his interest. To deny to such a person the benefit which he might receive from a suit conducted mainly or partly, for the benefit of another, would be to close the temple of justice against all persons not parties to the suit, and yet having interests in the subject of litigation, which may be affected by the determination of the cause. It is accordingly a principle, that any interest whatever in the subject of the suit, is sufficient to exempt him who gives aid to the suitor, from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest, to participate in the suit of another, who also has or claims, some right to the same subject. Bac. Abr. tit. Maintenance, letter B., and the several authorities there cited.

Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the voice of nature, and the language of the law equally declare, that such assis-

ALBANY,  
April, 1824.  
Thalhimer  
v.  
Brinekerhoff.

Our statute upon this subject is a compilation from the English statutes on the same subject.

It makes or supposes a distinction throughout, between innocent and unlawful maintenance.

To maintain the suit of another, is unlawful, unless the person maintaining has some interest in the subject of the suit, or is connected with the suitor in some social relation.

Having such interest he is, in effect, himself a suitor :

And whether the interest be great or small, vested or contingent, certain or uncertain, he may maintain.

So where there is consanguinity, or affinity be-

ALBANY,  
April, 1824.

Thalhimer

v.

Brinckerhoff.

tween the suitor and him who aids the suit, the assistance is lawful.

The laws against champerty, &c. were intended to prevent the interference of strangers, having no pretence of right in the subject of the suit, and standing in no relation of duty to the suitor.

The same rules and exceptions apply both to champerty and maintenance, the former being maintenance in a particular form.

The husband of one, who may by possibility be heir to the suitor, of the land in dispute, may maintain the action of the suitor, upon an agreement to have part of the land, in consideration of the maintenance.

tance is not unlawful maintenance. The relation of landlord and tenant, that of master and servant, acts of charity to the poor, and the exercise of the legal profession, are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice.

Upon all such cases, these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretence of right in the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise than as purchasers of the profits of litigation.

It has been urged, that champerty and maintenance are distinct offences ; and that champerty is illegal, in many cases, in which maintenance in other modes, would be lawful. If principles are considered, it seems to be of little moment, whether he who maintains the suit of another, receives his reward from the subject of the suit, or from any other property of the suitor. Champerty is one species of maintenance ; but the authorities do not declare contracts for a part of the thing in demand, universally unlawful. The distinction made by the books, between interference which is illegal, and that which is lawful, consists, in the rule, and the exceptions already stated ; and where maintenance is lawful, as in the case of interest in the subject, or relation to the suitor, a contract to divide the subject of the suit, which is maintenance in a particular form, is also legal.

In this case the wife of Thalhimer was the sister of Teller ; and this relation, recited in the contract, evidently led Thalhimer and Teller to the contract itself. Thalhimer did not obtrude himself into the concerns of a stranger ; but he agreed to give aid to his relative, as he might justifiably do. He was not the promoter of litigation, in which he had no concern. His wife might inherit Teller's lands ; and this reason alone, exempts the contract before us, from the imputation of champerty, or illegal maintenance. It is immaterial to this question, whether the contingencies which must occur, before Teller's sister could inherit, were such



as to render that event probable or not. She might become the owner of these lands, as the heir of Teller ; and this potential interest, was a sufficient reason, that her husband should join in measures to recover the lands.

The charge of champerty or maintenance, being the only objection made to this agreement, and that objection not being applicable to this case, the agreement is valid. The action now brought against Brinckerhoff, is assumpsit for money received by him for the use of Thalhimer. The contract not transferring any right in the lands themselves, to Thalhimer, the legal title remained in Teller, who had power to bring suits, to compromise the claim, and to release the legal title. Teller did compromise the claim and did release the legal title to the possessors of the land, for a sum of money ; this was done by Brinckerhoff acting under a power from Teller, and the money was received by Brinckerhoff. After these facts had occurred, there never could be a conveyance of any right in the lands, from Teller to Thalhimer ; and the agreement could have effect, only by considering the money received, as substituted for the land, in respect to the rights of Thalhimer under the contract. This construction gives effect to the contract ; and must be adopted as the sense of the contract itself, and as a necessary consequence from the events succeeding the contract, which rendered any conveyance of a right in the lands impossible. The compromise was valid, both in respect to Teller, and the possessors of the land ; and if this agreement now has any effect, it must operate upon the money received, as it might have operated upon the land, had the land itself been specifically recovered. If this contract could be defeated by acts of Teller and Brinckerhoff, in which Thalhimer had no part, and over which he had no control, the most flagrant injustice would be done to Thalhimer. The sense of the contract evidently is, that in the event of success, Thalhimer shall have one fourth part of the property ; whether the fruits of the claim should be realized in one species of property, or another.

Vol. III.

23

ALBANY,  
April, 1824.

Thalhimer  
v.

Brinckerhoff.

The action for  
money had  
and received  
is proper in  
this case ;

ALBANY,  
April, 1824.

Thalhimer

v.

Brinckerhoff

And is correctly brought in the name of Thalhimer alone.

The rights of Thalhimer in this suit, arise from his agreement with Teller, from the act of Teller in authorising the compromise, and from the acts of Brinckerhoff, in commencing the actions of ejectment, in making the compromise and in receiving the money. In commencing the actions of ejectment, Brinckerhoff acted as the attorney of both Thalhimer and Teller. In making the compromise, he acted as the agent of Teller, in respect to the possessors of the land ; for Teller having the legal title, he alone could give a power to compromise. But as Brinckerhoff had full knowledge of the rights of Thalhimer under the agreement, he may be justly regarded, in making the compromise, as the agent of both Thalhimer and Teller, in respect to their rights, and according to their respective interests. In these circumstances, the action for money received for the plaintiff, is entirely proper ; the use of that form being, to allow the introduction of the express contract, and all the acts of the parties ; and also to give effect to any tacit promise which law and justice may infer from all the facts of the case. The agreement determines, that Thalhimer's share of the money, is one fourth part ; and Brinckerhoff has not paid, as he ought not to have paid, this fourth part to Teller. This share is money belonging to Thalhimer, and remaining in the hands of Brinckerhoff. Thus, the objections made to the form of this suit, appear to be destitute of weight.

My opinion is, that the judgment of the supreme court should be reversed, and that the cause should be again sent to trial.

The Court being unanimously of this opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court, in this cause, be reversed, with costs in error to be taxed for the plaintiff in error ; and that the transcript be remitted to the said Supreme Court ; and that the said Court award a *venire facias de novo*.

WILLIAM SHARPSTEEN, plaintiff in error,  
against

WILLIAM M. TILLOU, defendant in error.

ALBANY,  
April, 1824.

Sharpsteen  
v.  
Tillou.

*He* made his will, by which he devised his house, &c. to his wife, and a comfortable maintenance to her, out of the income of his real estate, so long as she remained his widow; to his two sons, *E* and *I*, the use and improvement of all his real estate, except their mother's maintenance during her natural life; and directed that after her decease, all his real estate should be sold; and gave to his two sons, *E* and *I*, 150*l*. a piece, and to his 5 sons all the rest of his estate of all kinds, to be equally divided between them, and appointed *L*, *D*, and his son *I*, executors for the purposes in his will mentioned. *L* and *D*, strangers to the family, alone, proved the will, and took upon themselves its execution. The testator died, leaving a widow and his 5 sons, and the children of a deceased daughter. The widow having died, *I*, having also died without issue, and *E* and another son having died leaving issue, the two executors, *L* and *D*, sold the real estate. *Held*, that the objects of the testator, having been, in a great measure, defeated, and his intentions in giving the power frustrated, the power itself failed; and the sale was consequently void, so far as it depended upon the power; but the two surviving sons having also conveyed all their interest to the grantee of the executors; *held*, that their conveyance passed 2-5 of the real estate; that the power being inoperative, the real estate descended to the heirs at law.

The purposes of a testator, in giving a power by his will to sell real estate, must be ascertained from all the provisions of the will; and the objects of the power must be considered in connexion with the power itself.

A power to sell real estate in a will, fails when its objects are unattainable.

Where one directs his executors to sell land, *it seems* this is a naked authority, not coupled with an interest. There is no estate vested in the executors as such; and on the death of one executor, the power would not survive at common law. (*Opinion of the supreme court, not considered on error.*)

*It seems*, that the 11th sec. of the act concerning wills, (1 R. L. 366) merely provides for the case of an executor who refuses to act; but where executors are directed to sell the land, thus having a naked authority, if one die, though he never qualified as executor, the power is gone. (*id.*)

*It seems*, that where land is devised to executors to be sold, the survivor or survivors might sell at common law. (*id.*)

ERROR from the Supreme Court upon a special verdict.  
The action in the Court below was brought by *Tillou* against *Sharpsteen*, upon covenants of seisin contained in two deeds

ALBANY,  
April, 1824.

Sharpsteen  
v.  
Tillou.

in fee, from *Sharpsteen* and his wife to *Tillou*, for two several parcels of land in the town of *Washington*, *Dutchess* county, dated *March 16th*, 1819. The cause was tried at the *Dutchess* circuit, where the jury found a special verdict ; that after the deeds were executed, the plaintiff below, on or about the *1st of April*, 1819, entered upon and occupied the premises for a short time ; that *Moses Hallock* deceased, was, at the time of his death, seised in fee of the premises in question ; that he died in 1803, leaving a widow and several children his heirs at law, having made his last will ; that *Phebe Hallock*, who was the only witness sworn on the trial to establish the will, swore that herself, *Edward Hallock* and *John Allen*, were subscribing witnesses to the will ; that *Edward* was the son of *Moses Hallock* the testator, and *Edward* is now deceased ; that *Phebe*, the witness, was his wife, and now his widow ; that *John Allen* is infirm and unable to attend Court, and is unfit to give testimony from loss of mind ; that the will was duly executed by *Moses*, the testator, and witnessed by the above named witnesses, in presence of each other and the testator ; that, by this will, the testator directed his executors to pay his debts, &c. gave to his wife, if she outlived him, the best room in his house, two cows, her choice of one of his horses, all his household furniture, she to have a good comfortable maintenance out of the income of his real estate as long as she remained his widow ; then, after several legacies, he gave to his two sons *Edward* and *Isaac M.* the use and improvement of all his real estate, except their mother's maintenance, during her natural life ; and directed that, after her decease, all his real estate should be sold ; and gave to his two sons *Edward* and *Isaac M.* £150 a piece ; and, then, his will was that his five sons, *Isaiah*, *Peter*, *Obadiah*, *Edward* and *Isaac M.* have all the rest of his estate, of all kinds, not before disposed of, to be equally divided between them. He then appointed *Phineas Lounsberry*, *Samuel Doughty*, and his son *Isaac M.* his executors for the purposes in his will mentioned ; that *Doughty* and *Lounsberry*, two only of the executors, ever proved or took on them the execution of the will ; they did this, on the *3d September*, 1803 ; that the testator, at his death, left

ALBANY,  
 April, 1824.  
 Sharpsteen  
 v.  
 Tillou.

a widow, *Bridget Hallock*, and 5 sons, before named, and 6 grand children, the children of his deceased daughter *Miriam*; that *Obadiah* died in the year 1810, leaving 4 children who are yet alive; that *Isaiah* and *Peter* are now living; that *Edward* died in 1810, leaving *Phebe* his widow, and 3 children, 2 of whom are living, and 1 dead; that *Isaac M.* died in *June*, 1817, without issue, was never married, nor did he leave any last will or testament; that *Bridget*, the widow of *Moses Hallock*, died in the spring of 1818; that the children of *Miriam* are living; that *Lounsberry* and *Doughty*, as acting executors of the will of *Moses Hallock*, executed a deed for the premises in question to the defendant below, *William Sharpsteen*, dated the 29th August, 1818; that *Isaiah Hallock* and *Peter Hallock* also executed their deed to the defendant below, *William Sharpsteen*, for the premises in question, dated the 21st day of *May*, 1818; but whether, &c. and if, &c. the jury assessed the damages at \$3578,56, being  $\frac{2}{3}$  of the consideration money in the deeds to the plaintiff below, with interest.

On this verdict the Supreme Court gave judgment for the plaintiff below, with \$225,54 costs, making with the damages \$3803,80, in *January* term, 1823, for which they gave their reasons as follows:

*Reasons for the judgment in the Court below.*

The intention of the testator, in directing a sale, seems to have been, among other things, to provide for *Edward* and *Isaac*, by securing to them £150 each, out of the avails of the farm, in the first instance; and then an equal share with the other sons. This cannot be carried into effect, because *Edward* and his wife being witnesses, the devise to him is void. (1 R. L. 367. 4 John. Rep. 311. 1 John. Cas. 163.) Thus one object in view, when the power to sell was created, cannot be attained. *Isaac* also died before his mother. As to him the £150 are lapsed; for it was a personal devise to him solely. If the sale by the executors is held valid, they cannot make distribution according to the will.

The subsequent events are such, that had they been foreseen by the testator, a sale would not have been directed. In construction of these powers, the intent is much regarded,

If the object in creating the power ceases, the lands descend to the heirs at law. (6 *John*. 73.) On this ground, we think the sale by the executors cannot be supported.

On another ground, the sale is void. This is a naked authority to sell, not coupled with an interest. There is no previous estate created and vested in the executors as such. On the death of one executor, the power at common law would not survive. (*Bergen & others v. Bennet, 1 Cairnes' Cas. in Err*, 16.)

The 11th section of the statute concerning wills, (1 *R. L.* 366) provides for the case when part of the executors refuse to act, and makes valid all sales made by executors who take charge of the administration of the will. It leaves untouched the case of one of the executors dying before the sale. The statute recognizes the distinction between lands devised to executors, to be sold, and a devise directing them to sell the lands. In the former case, no statute provision was necessary to sanction a sale by surviving executors. In the latter, the legislature left the power, in the event of the death of one of the executors, to the operation of the common law. But whether the power was with or without an interest, all the executors must join, if living. The statute was passed to provide a remedy in case of refusal to act.

The defendant, however, having a sufficient conveyance from two of the sons of *Moses Hallock*, the plaintiff is entitled to recover three-fifths of the consideration money, only, and interest.

*J. Tallmadge*, for the plaintiff in error, contended, that the judgment in the Court below should be reversed, for the following reasons :

1. Because the power to sell contained in the will was sufficient, and well executed by the two surviving executors ; and their deed was effectual to pass the entire estate :

2. Because, if the power to sell was insufficient, or not well executed, yet the will was not void, but contained a good devise in fee, and the deed from *Peter and Isaiah Hallock*, the two surviving sons, conveyed a greater interest in the premises than two-fifths, as declared in the judgment of the Court.

He said, the judgment was erroneous, both in fact and law. If, as the Supreme Court assume, the power was void, then the judgment was for too much, provided the will is to operate for any purpose. The Court say, the devise to *Isaac M.* lapsed in consequence of his dying before the mother. If so, it descended to the other children of the testator, the grantors, *Isaiah* and *Peter* taking each one fifth of that share, which also passed by the deed, and should have been deducted from the verdict. The Court disregard the several lapses, which happened by the death of the several heirs, 3 of whom died in the life time of their mother. *Edward* and his wife witnessing the will, the devise to them being therefore void, this descended, in equal shares, to all. The interest of *Isaiah* and *Peter*, being two fifths also, in this share, passed by their deed. But taking the principles assumed by the Court below, and allowing the will to be void, still they have given judgment for too much, by one-fifth of *Isaac M.*'s share, who died without issue.

But the principles assumed in relation to this will, by the Court below, were not correct. The testator professes to dispose of all his estate, real and personal. After bequeathing several legacies, and making several devises, he disposes of all the residue of his personal estate to his 5 sons, and provides for the sale of his real estate, and the distribution of the avails. Two of his sons were to have £150 each, and the 5 to take the residue. Now suppose the power to sell was void, or incapable of execution, the whole passed to the 5 sons under the residuary clause. Though a power to sell be inoperative, there is nothing to prevent a residuary clause, embracing the fee, taking full effect. The Court had no right to pronounce the will void *in toto*, because a part of it failed. Then *Isaiah* and *Peter* took two-fifths under this clause; and, by the death of *Isaac* without issue, they took two-fifths of his share which passed by the deed. This makes the judgment erroneous for so much.

But the Court erred in saying that the power became void. They go on the ground, that where a power is given by the will to sell, and the object fails, the power goes with it; and they maintain and illustrate the position, by the case of

ALBANY,  
April, 1824.

Sharpsteen  
v.  
Tilou.

April, 1924.

Sharpsteen

v.  
Tillou.

a power to sell for the maintenance of a widow, who dies before the sale. (*Jackson v. Jansen*, 6 *John. Rep.* 73.) This is a very different case. Where a beneficial interest in the sale is given to several, because one dies, it does not follow that the power ceases as to all. If the object totally fails, the power fails also. Not so as to a partial failure; and the power shall be executed for the residue. Here the object still remains as to two of the devisees, who are living.

The Court say, that in the construction of these powers the intent is to be regarded. This is admitted in its fullest extent, and is, undoubtedly, applicable to the whole will. Here was a clear intent not to die intestate. The Court will almost disregard and break down the words of a power and a will, providing for a sale of lands, in order to effecuate this intent. (*Jackson v. Given*, 16 *John. Rep.* 167.) No intendment should be received, to defeat the intent not to die intestate, so plainly manifest upon this will. Yet the Court below have totally disregarded it. *Miriam's* children are let in, to share in the descent, though the ancestor expressly excluded them.

As to the number of executors necessary to execute the power—if this power be annexed to the office of executor, all the authorities agree that it may be executed by those only who take the trust. This will does annex the power to the office. The testator directs the payment of his debts, and, without saying by whom, the sale of his real estate. He then appoints his executors, in terms, *for the purposes mentioned in the will*. All the authorities agree, that where no one is designated to sell, the executors, as such, are to do it. It belongs to them *virtute officii*. It is only where persons are specifically designated as a kind of attorneys for the purposes of the sale, that the strict doctrine advanced by the Court below prevails. I contend, therefore, that the power was well executed by the survivors. (*Osgood v. Franklin*, 2 *John. Ch. Rep.* 1, 20, 21. 14 *John. Rep.* 527, S. C. on appeal. *id.* 553, S. C. *Jackson v. Ferriss*, 15 *id.* 346. *Jackson v. Jansen*, 6 *id.* 73.) All the authorities are referred to in these cases. *Davoue v. Fanning*, (2 *John. Ch. Rep.* 254) *Blatch v. Wilder*, (1 *Atk.* 420) and *Sugden on*



ALBANY,  
April, 1824.Sharpsteen  
v.  
Tillot.

*Powers*, 167, &c. are direct authorities to show that executors are the proper persons to sell lands not expressly directed to be sold by others, especially where the avails are intended to pay legacies. Here the avails were to be distributed among the children—a disposition in the nature of a legacy. In *Lessee of Zebach v. Smith*, (3 Bins. Rep. 69) the will ordered thus: “The executors, namely, A. B. and C. shall be empowered to sell my land, &c. and to give a good right.” Two of the executors refused to act, and one only sold. The Court held this well, and said that one might sell alone in all cases where the power is annexed to the office of executor: (*id.* 73.)

The Court say, that the 1 R. L. 366, s. 11, provides for the case when part of the executors refuse to act, leaving untouched this case, where one of the executors dies before the sale. In *Davoue v. Fanning*, (2 John. Ch. Rep. 254) the Chancellor said, “If all the executors named had the power by the will, then the sole acting executor has the power by the statute, (1 R. L. 366) on the neglect or refusal of the rest of the executors to act.” The statute declares, expressly, that if part refuse to act, all the power to sell shall devolve on those who qualify and take the trust; and the Court say, that the power is gone notwithstanding, if he who stands out die before it is fully consummated. This we deny. The full power passes instantly to those who take the trust; and no subsequent events can defeat this effect. The executor refusing is considered as having never existed; and this reasoning will be found strengthened, by comparing the statute, as it first passed, (1 Jones & Varick, 153) with the subsequent revisions. The survivor is expressly declared, by the old act, to possess the power; and, without this, the evil of the old law is not fully remedied.

*G. Bloom*, for the defendant in error, contended, 1. That the two surviving executors had not power to sell at the time of the conveyance to *Sharpsteen*: 2. That the judgment of the Supreme Court was correct, as to the rule of damages adopted by them.

He said the power did not survive to the two executors. It became a naked power by the death of one, the survivors being strangers to the family, and having no interest in the subject. It does not appear that there were any debts to pay, or other charges against the estate. There were no practicable objects to be attained by the sale, after the widow's death. This will directs the executors to sell. There is no unqualified command to do this. All the authorities agree, that a power conferred by such language is a naked one. "If a man, by his will, direct his executors to sell his land, this is but a bare authority to sell, without interest; for the land, in the mean time, descends to the heir at law, who, until the sale, would, at common law, be entitled to the profits—and being but a naked authority, if one of the executors die, the power, at the common law, would not survive." (*Bergen v. Bennet*, 1 *Caines' Cas. in Err.* 16. *Pow. on Dev.* 291 to 310. 3 *Salk.* 277. *Co. Litt.* 113, a. *id.* 181, c. *id.* 236.) It is a general rule, that a power not coupled with an interest is a naked power. A power simply collateral, and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he has no estate whatever. (*Pow. on Powers*, 8, 10, 12. *Butler's note*, 298, to *Co. Litt.* 342, b. *Edwards v. Sleater*, *Hardr.* 415, 416.) In all the cases cited against the position for which I contend, there was a power coupled with an interest, or a trust committed, capable of execution at the time.

It is agreed that the intention is much regarded in the construction of these powers. What was the testator's intention in the instance before us? First, to provide for the widow, by leaving her in charge of *Edward* and *Isaac* his sons: secondly, to provide for them, by giving each, on a sale of the estate, \$375. The latter object could never be accomplished by the sale. *Edward* and his wife being witnesses, the devise to them was void, (1 *R. L.* 367, s. 12; *Jackson v. Denniston*, 4 *John. Rep.* 311; *Same v. Woods*, 1 *John. Cas.* 163) and *Isaac* died before his mother, without heirs, and without a will. Of course, his share lapsed, and diffused itself among all the brothers and sisters. (*Toll. L. E.* 171, 2, 3, 305, 304.) Indeed, whether it lapsed or vested,

can make no difference, because it would descend in the same manner, at his death, to his brother's and sister's children. The provision for both, then, failed. The intention of the testator was defeated. Beside, the gift to *Edward* and *Isaac* was personal—not to them and their heirs. The farm was sold for \$3000, fifteen years after the testator's death. Taking out \$750, would leave only \$450 to each of the five sons. *Edward* never took any interest in this, and *Isaac* died before the sale. How the executors could substitute takers of the sale money, so as to fulfil the testator's intention, it is impossible to conceive. Every member of the family would get more or less than the testator intended.

Again: when every material object contemplated by a testator, in framing his will, fails, the will itself must, of consequence, fail, and the property be regulated by the statute of descent and distribution. Could the testator here have foreseen the changes which have occurred in his family, will any one suppose that he would have left such a will?

The Court below were correct in saying that our act, (1 R. L. 366) does not apply to a survivorship of executors, but leaves the case as it stood at the common law.

If the Court, however, should think that the power did not survive to *Lounsberry* and *Doughty*, and yet consider the will good, then they will affirm the judgment of the Supreme Court in part, and reverse it in part, exercising a discretion as to the costs. (*Waters v. Travis*, 8 John. Rep. 566. *Anonymous*, 12 id. 340.) The judgment was founded on the supposition that the will is void, and that *Peter* and *Isaiah* conveyed only two-fifths of the farm; whereas, if the will be good, they were entitled to two-fifths of the whole, and also two-fifths of *Edward's* and two-fifths of *Isaac's* lapsed shares. This would lessen the amount of the judgment some, but not to any considerable amount.

THE CHANCELLOR. The objects which the testator seems to have contemplated, in directing that his real estate should be sold after the decease of his widow, have been, to a great extent, defeated by himself, by rules of law, and by events which occurred after his death. His son *Edward* being a

ALBANY  
April, 182  
Sharpster  
v.  
Tillou.

The objects  
of the testator  
have been, to  
a great extent,  
defeated;

ALBANY,  
April, 1824.

Sharpsteen  
v  
Tillotson.

And the intentions of the testator, in giving the power, frustrated.

The purposes of a testator, in giving a power by his will, must be ascertained from all the provisions of the will ; and the objects of the power must be considered in connexion with the power itself.

It fails when its objects are unattainable.

The power to sell having failed, the 5 sons do not take the land as devisees.

witness to the will, could take nothing under it ; and all the beneficial intentions of the testator towards this son, are ineffectual. If the bequest of one hundred and fifty pounds to his son Isaac M., is considered as payable from the product of the real estate when sold, and such is the sense of the will, this contingent legacy fails ; Isaac M. having died, before the power to sell, was, or could be exerted. The intended dispositions of the money which should arise from the sale of the real estate, are, to a great extent, impossible ; and in these circumstances, the intentions of the testator in giving the power, are frustrated. This power to sell, can not be disjoined from the other provisions of the will ; the purposes of the testator in giving the power, as in other respects, must be ascertained from all the provisions of the instrument ; and the objects of the power, must be considered in connexion with the power itself. In the case of Jackson v. Jansen, 6 John. 73, the supreme court held, that where the object of a testator in giving a power to sell, had ceased, the power itself, also ceased. In this case I am of opinion, that by the total nullity of the will in respect to the portions of the estate intended for Edward, and by the failure of the legacy of two hundred and fifty pounds to Isaac M., the objects of the power had so far failed, that there was not a valid power to sell, in 1818, when a sale was made by two of the executors. The power fails, because its objects are unattainable.

It is urged by the counsel of Sharpsteen, that if the power to sell failed, the five sons of the testator took the land, as devisees. But this seems not to be the sense of that clause of the will, by which the testator gives all the rest of his estate not before disposed of, to his five sons. The testator had before made dispositions of all his real estate ; and his intention concerning the residue, must be understood to exclude his land. He had indeed, previously disposed of all his moveable estate ; but whether the terms, moveable estate, were used by him, to comprehend all his personal estate, or in some sense more restricted, is uncertain. The testator in making the final bequest of the residue of all his estate, seems to

have supposed that his land would be sold, and might produce a sum greater than would be sufficient to discharge the legacies ; and upon that supposition, he probably meant to dispose of such an excess. But his intentions declared by this will, are to a great extent null ; and the last disposing clause of the will, seems not to be a devise in fee of his land.

The land of Moses Hallock, not being devised in fee, and being subject only to the temporary charges made in the will, descended by his death, to his heirs at law. His heirs were five sons, and six children of a deceased daughter. Each of his five sons, therefore took a sixth part ; and the children of his deceased daughter, took another sixth part of his land.

Isaac M. Hallock died in 1817, intestate, and without issue. His heirs were his brothers Isaiah and Peter, the children of his deceased sister, those of his deceased brother Edward, and those of his deceased brother Obadiah. The share of Isaac M. in the land of his father, thus descended in five portions ; Isaiah and Peter each taking a fifth part of that share,

Isaiah and Peter, as heirs of their father, each took a sixth part, and as heirs of their brother Isaac M., each of them took a fifth part of his sixth part of the land. These fractions added, and more simply expressed, are two fifths of the whole ; and the result of all these descents gave to Isaiah and Peter, the same proportion of the whole, which they would have taken, had the land descended by the death of Moses Hallock, in five shares, instead of six. Isaiah and Peter were thus, severally, owners of one fifth part of the land, on the twenty first day of May 1818, when they conveyed all their title to Sharpsteen ; and he then acquired a title to two fifths of the land in question.

The conveyance from the executors being void, for want of a sufficient power ; the conveyance from Isaiah and Peter being valid, to the extent of their rights, and their rights embracing two fifths of the subject ; the title conveyed by Sharpsteen to Tillou, has failed, in respect to three fifth

ALBANY,  
April, 1824.

Sharpsteen  
v.  
Tillou.

The power becoming null, and the land not being devised, it descended to the heirs at law.

Judgment below was properly for 3-5 of the consideration.

Process by which this result was reached.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

Judgment af-  
firmed unani-  
mously.

parts of the land. I am accordingly of opinion, that there is no error, in the decision of the supreme court.

The Court being unanimously of this opinion, it was, thereupon ORDERED, ADJUDGED and DECREED, that the plaintiff take nothing by his writ ; and that the defendant go thereof without day. And it was further ORDERED, ADJUDGED and DECREED, that the defendant recover against the plaintiff his costs to be taxed, in defending the writ of error in this cause ; and that the record be remitted, &c.

---

THE PRESIDENT, DIRECTORS and COMPANY of the BANK  
OF UTICA, plaintiffs in error,  
*against*  
A. K. & G. M. SMEDES and A. CAMFIELD, defendants in error.

The endorsement and delivery of a promissory note to a bank, on its request, is a sufficient consideration for an undertaking, on the part of the bank, to charge the endorser by a regular notice of non-payment ; and if they neglect to do this, the holder or owner of the note, to whom the promise is made, may maintain an action against them, and recover damages for the neglect.

A count for such neglect would be good as a count for a misfeasance, the receipt of the note, and neglect to perform the undertaking, being properly a mismanagement of the business undertaken. The acceptance of the note by the bank may well be considered the first step in the execution of the contract, and no other consideration is necessary.

Objections, not taken in the supreme court, can not be taken in the court of errors.

A corporation may make any contract, to do an act at any place, if such contract be within the scope of its general powers.

It seems, that a statute incorporating a bank is, in its nature, a public statute.

The declaration stated that the bank of *Utica* had, pursuant to the act of the legislature, passed the 10th day of *April*, 1815, established an office of discount and deposit in *Canandaigua*. *Held*, a sufficient recital of the act in pleading, though it should be considered a private act ; especially after verdict.

The declaration alleged that the defendants had undertaken to charge the first endorser of notes payable on demand ; and set forth this first endorsement of the notes to the plaintiffs as having been made on a day certain—the endorsement and delivery of the notes, by the plaintiffs, to the

defendants, about six months thereafter—and their undertaking at the latter time. *Held* sufficient, especially after verdict, though the declaration did not aver that the demand of payment was made within a reasonable time.

What is a reasonable time, within which a note payable on demand should be presented for payment, in order to charge an endorser, depends on all the facts of the case, to be proved at the trial.

The power of a verdict to cure formal defects in pleading, should be liberally applied.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

**ERROR**, from the Supreme Court. The cause was tried, in the Court below, at the *Ontario* circuit, in *June*, 1821, before (the late) Mr. Justice *Yates*; the venue, which was originally laid in the county of *New-York*, having been changed by an order of the Court.

The declaration, the only part of the proceedings questioned upon the writ of error, consisted, beside the money counts, of 3 special counts, the first of which was as follows:

*City and county of New-York, ss. The President, &c. of the Bank of Utica*, were summoned to answer *A. K. Smedes, &c.* of a plea of trespass on the case, &c.; and thereupon the said *A. K. Smedes, &c.* by *Evert A. Bancker*, their attorney, complain for this, to wit, that whereas, on the 14th day of *February*, 1818, and before and since that time, at the 1st ward in the city of *New-York*, and in the county of *New-York*, *A. K. Smedes, G. M. Smedes and Abiel Camfield*, plaintiffs, were merchants and co-partners in trade, under the name, style and firm, of *A. & G. Smedes & Camfield*; and whereas, also, the before named defendants, the *President, &c. of the Bank of Utica*, on the day and year aforesaid, and before and since that time, pursuant to the act of the legislature of the state of *New-York*, passed the 10th day of *April*, *A. D.* 1815, had established an office of discount and deposit in *Canandaigua*, to wit, at the 1st ward in the city of *New-York*, and in the county of *New-York*, and were then and there transacting and doing business as bankers, by virtue of the act aforesaid, under the name, style and description of the *Utica Branch Bank in Canandaigua*; and whereas, also, on the 12th day of *August*, *A. D.* 1817, at, &c.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes,

to wit, at, &c. *Punderson B. Underhill* and *Harris Seymour* were merchants and copartners in trade, under the name, style and firm of *Underhill & Seymour*; and whereas, also, on the said 12th day of *August, A. D. 1817*, the before named *P. B. Underhill* and *H. Seymour*, at, &c. to wit, at, &c. or one of them, for and in the name of the said firm of *Underhill & Seymour*, made a certain note in writing, commonly called a promissory note, bearing date the same day and year last aforesaid, and then and there delivered the said note to a certain *John C. Spencer*; by which said note, the said *P. B. Underhill* and *H. Seymour*, under the name and signature of *Underhill & Seymour*, promised to pay to the order of the said *John C. Spencer*, by the name and description of *John C. Spencer, Esquire*, at the *Utica Branch Bank*, 1237 dollars, with interest from date, for value received: and the said *J. C. Spencer*; to whom, or to whose order, the payment of the said sum of money mentioned in the said note, was to be made as aforesaid, afterwards, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year last aforesaid, at &c. to wit, at &c., endorsed the said note in writing, with his proper name and signature of *J. C. Spencer*, and by that endorsement, ordered and appointed the contents of the said note to be paid to the before named *A. K. Smedes, &c.* the before named plaintiffs; and then and there delivered the said note, so endorsed, to the said *A. K. Smedes, &c.*; and the said *A. K. Smedes, &c.* to whom, or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made as aforesaid, afterwards, and before the payment of the said sum of money; mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note, for the payment thereof, to wit, on the day last aforesaid, at, &c. to wit, at, &c. endorsed the said note in writing, with the name and signature of the said firm of *A. & G. Smedes and A. Cumfield*, and, by that endorsement, ordered and appointed the contents of the said note to be paid to the before named defendants, *The*



*President, &c.* at the *Utica Branch Bank* in *Canandaigua*: and the said plaintiffs, for the more effectual recovery and collection of the moneys in the said note specified, according to the tenor and effect of the said note, and of the said endorsements so made thereon as aforesaid, afterwards, to wit, on the 14th day of *February*, A. D. 1818, at, &c. to wit, at, &c. caused the said note to be deposited at the office of discount and deposit established by the defendants, pursuant to the statute in such case made and provided, under the name and style of the *Utica Branch Bank* at *Canandaigua*, aforesaid, to be collected by the said defendants, in behalf of them, the before named plaintiffs. And the said *President, Directors and Company of the Bank of Utica*, in the village of *Utica*, the before named defendants, thereupon, to wit, on the said 14th day of *February*, A. D. 1818, at, &c. to wit, at, &c. in consideration that the said plaintiffs had so endorsed and deposited the said note for collection, in manner and form aforesaid, thereupon assumed upon themselves, and then and there faithfully undertook to present the said note, and demand payment of the sum of money specified in the same, from the said *P. B. Underhill* and *H. Seymour*, according to the tenor and effect of the said note, and of the several endorsements so made thereon as aforesaid; and in case default should be made in the payment of the said sum of money in the said note mentioned, or of any part thereof, by the said *P. B. Underhill* and *H. Seymour*, as aforesaid, then the before named defendants, *The President, &c.* in the village of *Utica*, further assumed upon themselves, and then and there, in consideration of certain reasonable fees and rewards, to be therefore paid by the said plaintiffs to the said defendants, they the said defendants undertook, according to the usage and custom of merchants, well and truly to notify, or cause notice to be given, to *J. C. Spencer*, the before named endorser, of the non-payment and protest of the said promissory note, and by such notice, by force of the statute in such case made and provided, render the said *J. C. Spencer* liable as indorser for the payment of the said sum of money, in the said

ALFANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

April, 1824.

Bank of Utica

v.  
Smedes.

Note specified, according to the tenor and effect of the said note, and of the said endorsement, so by the said J. C. *Spencer* thereon made, as aforesaid. And the said plaintiff, in fact, say, that the said P. B. *Underhill* and H. *Seymour*, afterwards, to wit, on the 14th day of February, A. D. 1818, at, &c. to wit, at, &c. did neglect to pay the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said endorsements, so thereon made as aforesaid, and did then and there wholly refuse and make default therein ; and although it became and was the duty of the said President, &c. under and by virtue of the said undertaking, to cause due notice to be given of the non-payment and protest of the said promissory note, to the said J. C. *Spencer*, endorser as aforesaid ; yet the said President, &c. not regarding their duty in that behalf, nor their undertaking aforesaid, in form aforesaid made, but contriving and fraudulently intending to injure and defraud the before named plaintiffs, A. K. *Smedes*, &c. in this behalf, did not nor would well and truly notify, or cause due notice to be given to the said J. C. *Spencer*, endorser as aforesaid, of the non-payment of the said promissory note, by the said P. *Underhill* and H. *Seymour*, but wrongfully and injuriously, afterwards, to wit, on the 14th day of February, A. D. 1818, at, &c. to wit, at, &c. wholly neglected and refused so to do ; and by reason of the default and neglect of the defendants aforesaid, the said A. K. *Smedes*, &c. for want of evidence of such due notice to the said J. C. *Spencer*, endorser as aforesaid, have not only failed and been defeated in their suit subsequently instituted in the Supreme Court of Judicature of the People of the state of New-York, for the recovery of the moneys in the said promissory note specified, from the said J. C. *Spencer*, endorser as aforesaid ; but in pursuance of the judgment had and obtained against them, the before named plaintiffs in the suit aforesaid, and entered up in favour of the said J. C. *Spencer*, in the said Supreme Court, &c. on the 4th day of October, A. D. 1819, at, &c. to wit, at, &c. have been compelled to pay and did pay, on, &c. 29 dollars and 12 cents to the said J. C. *Spencer*, as well for his costs and charges in and about his

defence in the said action, as for the Sheriff's fees and poundage in serving a writ of *fi. fa.* issued in pursuance of, and by virtue of the judgment aforesaid; and the said plaintiffs, by reason of the said judgment so had and obtained against them, were further rendered liable and are still liable, to pay a large sum of money, to wit, the sum of 75 dollars, for their costs and charges accrued in and about the prosecution of the said action, to wit, at, &c. and have lost and been deprived of the means of recovering the same from the said *J. C. Spencer*, endorser as aforesaid, to the damage, &c. \$2000, of all which the said defendants, on, &c. at, &c. had notice.

The second count was substantially the same with the first, except that the consideration of the promises by the defendants below was alleged to be that the plaintiffs had, at the defendants' request, employed them to present and demand the note of the makers, and had, at the defendants' like request, employed them, for certain reasonable fees and rewards, &c. to protest and give notice, &c.

The 3d count was as follows: And whereas also, heretofore to wit, on the said 14th day of *February*, 1818, at, &c. in consideration that the said plaintiffs, at the special instance and request of the said defendants, would endorse and deliver to them the said defendants, a certain other promissory note in the words and figures following, to wit: "*Canandaigua, August, 12th, 1817. Six months after date, we promise to pay to the order of John C. Spencer, Esq. at the Ulica Branch Bank, twelve hundred and thirty seven dollars, for value received, with interest from date. Underhill & Seymour. Dolls. 1237,00;*" which said note had been, theretofore, to wit, on the said 12th day of *August*, A. D. 1817, at, &c. to wit, at, &c. according to the statute in such case made and provided, and agreeable to the usage and custom of merchants, duly endorsed by the said *J. C. Spencer*, (to whom, or to whose order the said note was made payable,) to the before named plaintiffs, and had also, according to the usage and custom of merchants, been duly endorsed by the before named plaintiffs, to the said defendants, or order, with intent that the said defendants might, as the hold-

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

ers thereof, according to the usage and custom of merchants, and by the force of the statute in such case made and provided, receive and collect the monies in the said note specified, for the account, use and benefit of the said plaintiffs; and in case the said note should not be paid by the said *P. B. Underhill* and *H. Seymour*, at the time and place specified in the said note, according to the tenor and effect thereof, and of the endorsements so thereon made as aforesaid, with the further intent that they, the said defendants, should then and there, according to the usage and custom of merchants, and by force of the statute in such case made and provided, protest or cause to be protested the said promissory note, and notify or cause to be notified the said *J. C. Spencer*, endorser as aforesaid, of the non-payment of the said sum of money in the said note mentioned, according to the tenor and effect of the said note and of the endorsements so thereon made as aforesaid, they the said defendants undertook and then and there faithfully promised, that they, the said defendants, would duly present the said note to the said *P. B. Underhill* and *H. Seymour*, the drawers thereof, at the *Utica Branch Bank* in *Canandaigua*, on the said 14th day of *February*, A. D. 1818; and in case the said *P. B. Underhill* and *H. Seymour* should make default, or neglect to pay the said note, the said defendants undertook and then and there faithfully promised to protest, or cause the said note to be protested for the non-payment thereof, and duly to notify or cause due notice to be given, to the said *J. C. Spencer*, endorser as aforesaid, of the neglect and default of the said *P. B. Underhill* and *H. Seymour*, in not paying the said sum of money in the said note specified, according to the tenor and effect thereof, and of the endorsements so thereon made as aforesaid. And the said plaintiffs, in fact, say, that they, the said plaintiffs, confiding in the promise and undertaking aforesaid, by the said defendants, in form aforesaid made, did afterwards, to wit, on the 14th day of *February*, A. D. 1818, deliver to the said defendants, at their office of discount and deposit, styled the *Utica Branch Bank* in *Canandaigua*, the said note endorsed as aforesaid, for the purpose aforesaid. Yet the said defend-

ants, not regarding the said promise and undertaking, but contriving and intending to injure the said plaintiffs, in that behalf, did not, nor would notify, or cause due notice to be given to the said *J. C. Spencer*, endorser as aforesaid, of the neglect and default then and there made of the said *P. B. Underhill* and *H. Seymour*, in failing to pay the said sum of money in the said note mentioned, according to the tenor and effect thereof, and of the said endorsements so thereon made, as aforesaid ; but did then and there wholly fail and make default therein ; by means whereof the plaintiffs have wholly lost and been deprived of the said sum of money in the said note mentioned, to the great damage of them the said plaintiffs, to wit, of, &c. of which premises the said defendants, afterwards, to wit, on, &c. at, &c. had notice.

*Plea*, the general issue.

There was a general verdict for the plaintiffs below, upon all the counts in the declaration. for \$1610,03, upon which the Court below gave judgment in *January* term, 1823, for the reasons given, 20 *John. Rep.* 377 to 385, *S. C.* where the evidence necessary to sustain these counts was very fully considered by *WOODWORTH, J.* who delivered the opinion of the Court upon a case made. There being no special verdict or bill of exceptions, the evidence was not before this Court ; but the cause went entirely upon the sufficiency of the declaration. Much of Judge *Woodworth's* opinion will, however, be found applicable to the questions raised here.

*P. S. Parker*, for the plaintiffs in error, remarked, generally, that where there is a substantial defect in a declaration, the defendant may avail himself of it by demurrer, motion in arrest, or writ of error. The verdict in this case is general, upon all the counts, three of which are special ; and if either be defective in substance, our writ of error is sustained. It is true, Courts have gone as far as possible in the amendment of the proceedings below, by entering the verdict upon the good counts, if warranted by the minutes of the Circuit Judge. Nothing of that kind, was, however, done in this case.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

1. There does not appear, in any part of the declaration, an authority in the defendants below to transact banking business at *Canandaigua*. There is no statute recited or set forth, giving them such authority, and there is no public act to that effect. It will hardly be contended, that a bank has an incidental right to establish offices of discount and deposit; nor is there any thing, in the original charter of the *Bank of Utica*, giving them such a right. Then, if there was any authority to do this, it should have been specially shewn. The plaintiffs below did not seek to recover of any officer of the branch, but of the mother bank—not for the act or omission of the bank, but for the fault of an individual. If the *Bank of Utica* had no right to erect this office, they are not liable; and, in all cases, where a party seeks to establish a right in virtue of a private act, as this must be, he must plead the act as he would any other record. True, the declaration refers generally to an act authorizing the establishment of an office at *Canandaigua*, but the act itself should be set forth specially, to shew the connexion between the mother bank and the agent. (1 *Chit. Pl.* 218. 1 *Bl. Com.* 86. *Bac. Abr. Statute, (L.)*.) Here even the title of the statute is not mentioned.

2. The 1st and 2d counts of the declaration set forth a note payable on demand; and no cause of action could arise against the defendants below, for negligence in not presenting such a note for payment, and in omitting to notify the endorser 6 months after it was due. No time of payment being specified in the notes, they were due and demandable immediately. (*Thompson v. Ketcham*, 8 *John. Rep.* 192. *Herrick v. Bennett*, *id.* 374. *Sheehy v. Manderville*, 7 *Cranch*, 217.) The notes are stated, in both these counts, to have been made and dated on the 12th August, 1817; to have been endorsed by *Spencer* at that time; and to have been deposited in the bank on the 14th day of February, 1818; at which time the defendants below promised to make demand and give notice. What duty was imposed upon the defendants? Of what avail were a demand and notice at that late day? Two months and a half have been holden an unreasonable delay. This must depend on circumstan-

ces; such as the distance between the residence of the holder and the other parties. In this case, there would be a material difference, as to time, between a residence of the drawers in *South Carolina*, and the village of *Canandaigua*; and nothing appears that they did not reside at the latter place. But suppose they resided at the city of *New-York*, at the date of the note—a demand might have been made, and the usual time of communication, which is but a few days, between these places, would have carried notice of non-payment to *Canandaigua*. There is an allegation that the plaintiffs below brought a suit against the endorser, and were defeated, with costs, for want of due notice. This appears, on the face of the declaration, to have been their own fault. (*Chitty on Bills*, 350.)

3. There is no sufficient consideration set forth in the 3d count. The promise relied on was a *nudum pactum*. There is a wide distinction, in this respect, between a non-feasance and misfeasance. In the latter case, an action lies for negligence, though the undertaking be without consideration: otherwise for a non-feasance. In such case, a full and plain consideration must be clearly stated, to warrant an action. (*Thorne v. Deas*, 4 *John. Rep.* 84.) In the case cited, all the authorities are stated and considered.

That error will lie upon one count substantially bad, though the others be good, if the verdict be general, the Court are referred to *Hopkins v. Beedle*, (1 *Caines' Rep.* 347) *Grant v. Astle*, (*Doug.* 730) *Cheetham v. Tillotson*, (5 *John. Rep.* 430) and *Trevor v. Wall*, (1 *T. R.* 151.)

The distinction upon which we rely, between a non-feasance and misfeasance, is admitted by his honor Judge *Woodworth*, who delivered the opinion of the Court below upon the case made. He admits, that ordinarily, in the former case, there must be a complete consideration appearing upon the face of the declaration; but he considers that banks form an exception. Where is the distinction? Suppose this had been the case of an individual banker or broker; would not the case be precisely the same in principle? Is it true, of them, that the mere delivery of the paper, and the expected benefit to be derived from deposit, funds, facilities, &c. would form a legal consideration? If not, why

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

otherwise as to incorporated banks: The learned Judge adverts to the case of *Elsee v. Gatward*, (5 T. R. 143.) Now, in that case, the Judges agree, that if *Gatward* had performed, he might have had an action for his compensation against *Elsee*; but this expectation of benefit was not allowed to form a consideration. Having done nothing towards the work, though it was in the line of his business as a carpenter, yet this circumstance did not make out a consideration. How is it possible to distinguish the two cases? The very point decided in *Thorne v. Deas*, (4 John. Rep. 96) was, that an action will not lie in such a case. In this case, we admit, that if the bank had got the money in their vaults, they would have been liable; but they were as much at liberty to attempt obtaining it or not, as *Gatward* was to undertake or omit the building. The only consideration alleged by this count is, that the plaintiffs would deliver the notes to be collected for the plaintiffs' benefit. This is no consideration at all. The delivery of the notes was no benefit to the defendants. It does not appear, by the declaration, that they could possibly derive any benefit.

4. The 3d count does not aver the non-payment of the note by the makers. This was an essential averment, and payment not being negatived, we have a right to infer that it was made at the day.

5. Neither of the counts aver that the makers were insolvent. Without this, the plaintiffs below could have sustained no damage.

*S. M. Hopkins*, for the defendants in error. The note in question, in fact, fell due on the 14th of February, 1818, as averred in the 3d count. The opinion of the Court below was given upon the merits of the case, as they appeared at the circuit, and has very little bearing upon the form of the declaration, which, alone, is questioned here. The informalities in the record were never brought to the view of the Court below in any shape; and this furnishes us with one answer to the writ of error. It is, that the defendants below should have taken their objections in the Supreme Court, by demurrer or motion in arrest. We are not to be met, for



the first time with them, here. This was determined in the late case of *Colden v. Knickerbacker*, (2 Cowen's Rep. 31) which holds that, to warrant reviewing a point here, it must have been expressly passed upon by the Court below.

ALBANY,  
April, 1824.  
Bank of Utica  
v.  
Smedley

It is admitted, that the first and second counts aver a sufficient consideration ; but there is a clerical mistake, in not setting forth the note as payable at 6 months. In the third count, however, the note is truly set forth ; but this is said to be defective, in omitting to aver a sufficient consideration. The law does not require a full consideration. The merest trifle is sufficient. An attorney who engages to defend a suit for \$5 received, is bound to a faithful discharge of his duty, and is fully amenable for all the damages arising from his neglect. Equally so, if he engages to defend upon the express or implied promise of his client to pay him the reasonable or legal fees. If he simply engage to defend a cause, without any thing farther, it is a mere naked promise ; but if any thing be done by the client, or any liability incurred, the attorney will be bound. The slightest loss or inconvenience, on the part of the promisee, makes a sufficient consideration. (1 Com. on Cont. 16, 17.) This is fully exemplified in the books. An executor is not bound without assets ; yet if he promise the creditor, "prove your debt and I will pay it," he is bound, on the condition being performed. A delivery of goods, in which one has only a special property, (*Bind v. Plain*, Cro. Eliz. 218) or mutual acceptance of bills to the same amount, is also a good consideration. So intermarriage with a third person. (*Brown et ux. v. Garborough*, Cro. Eliz. 63.) So performance of what the promisee was previously bound to do by an award. (*Foster v. Scarlet*, Cro. Eliz. 70.) So a promise to show a deed. (*Sturlyn v. Albany*, Cro. Eliz. 67. *id.* 150, S. C.) Doing an act for the benefit of a third person, at the defendant's request. (*Hunt v. Bate*, Dy. 272, b.) In the margin of this page, the plaintiff's sealing a lease is mentioned as a consideration, though it was of no consequence to the defendant. Now, in the 3d count, it is thus set forth : "In consideration that the said plaintiffs, at the special instance and request of the said defendants, would endorse and deliver to them, the

April, 1824.

Bank of Utica  
v.  
Smedes.

and defendants, a certain other promissory note, in the words and figures following," &c. (*setting forth the note in question, and that it was endorsed and delivered.*) Here is a consideration, within the cases, fully stated. The endorsement and delivery put it upon the defendants to make the demand and give the notice; otherwise the plaintiffs' remedy against the endorser would be gone forever. The plaintiffs ceased to hold the note. They had put it out of their power, therefore, to make the demand, at the request of the defendants; and the mere fact that they had incurred this inconvenience was enough. The consideration is not merely formal, as supposed. The distinction between non-feasance and misfeasance is founded on the case of *Coggs v. Bernard*, (2 *Ld. Raym.* 909) and I had supposed this case would have been cited. It has not been; and, I presume, for the reason that it would make decidedly against the plaintiffs in error. The receipt of the property, and beginning to act about it, was holden enough, in that case, to bind the bailee to its prudent management, according to the terms of the bailment. Having the note in their possession, controlling it exclusively, and not acting at the proper time, became a deceit upon us, which worked a lasting injury. If the act is commenced, it must be finished—it must be well, truly, faithfully, and correctly done, according to the nature of the act to be performed—otherwise an action lies. In this case, an attorney undertakes to charge an endorser. *Coggs v. Bernard* is, that if you begin the trust, you must go through with it. I retain an attorney to defend, put my papers in his hands, and he omits to appear, by which I am damnified, in the loss of my cause, or otherwise—was it ever doubted that he would be liable? Here the papers are delivered, and no notice given; yet, say the bailees, "we might act our pleasure, and ruin you with impunity—we have a right to go on, and do the business at the halves, and yet you have no remedy for our carelessness." Is this to be tolerated? In *Coggs v. Bernard*, there were two objections—one, a want of consideration—the other, that the defendant was not shewn to be a common carrier. The objection, and all the reasoning in that cause, pre-supposed and admitted that the being a com-

mon carrier, whose business it is to convey goods, have been sufficient to sustain the action. Here is mon collector; and his honor Mr. Justice *Woodworth* held, that the bank was liable, on the ground that in the ordinary course of their business, of which made a profit. This abundantly appeared upon a consideration of the merits.

But if all the defects imputed to this declaration they are cured by the verdict. The objection is to defectively set forth—not a defective title. (*Rex v. L 2 Str.* 1011.) In *Small v. Cole & Skinner*, (2 Burr. 1161) the demise was laid as having been made 30 after the memorandum; yet the Court held that this was cured by the verdict. *Dennison, J.* gave as a reason that no doubt a proper title was proved upon the trial. *Dig. Pleader, (C.)* 87, refers to various cases of this character. One defect complained of is, that our declaration does not allege a neglect to pay the notes. I say the defendants caused no notice to be given that payment was not made—an averment of non-payment, to be sure, is somewhat circuitous and argumentative, but no ground of objection upon error. It is a mere formal defect, scarcely objectionable by special demurrer. The position is better settled, than that a verdict shall cure a defect which may be supposed, from the record, to have been proved at the trial. Neglect was essential to maintain the action before the jury, and must have been proved. An omission, therefore, is cured. (*Hornsey v. Dimocke*, 11 119. *De La Barre v. Jones*, Hardr. 222, Bull. N. P. *Hall v. Douglass*, Barn. 452. *Huffam v. Ellis*, 3 2 415.) Indeed, it is a negative averment, which it lays upon the defendants to disprove. If this be not done, it is taken as proved from the nature of the issue.

We must not, however, be considered as admitting this declaration is substantially defective; for we do not think this can be maintained. On the subject of what consideration is necessary, we also refer to *Com. Dig. A upon the case upon assumpsit, (R. 1, 2, 3.)* In *Anonys*, (2 Vent. 45) the consideration alleged and held good

that the plaintiff paid to the defendant so much money, who assumed to pay a like sum into Court and appear—a case much like the present. The bank received a note, equivalent in itself to money, which, in the ordinary course of things, would produce to them its face in cash, from which they might have derived a benefit as a deposit. They are, at any rate, benefitted as much as the attorney was in *Ventris*, though they forthwith pay out the money. Again: if, in consideration that you will pay *A* such a sum of money, I promise to pay *B* the same sum. this binds me to the payment, though I derive no benefit from the consideration. (*Com. Dig. Action upon the case upon assumpsit, (B.) 11.*) Again: if the plaintiff will permit the defendant to receive money of *A*, which he owes the plaintiff. the defendant promises to give the plaintiff a bill of exchange for so much: this shall bind, though *A* become insolvent and never pay; for the plaintiff, perhaps, would not have delayed, had it not been for the defendant's promise. (*id.*)

We admit that the doctrine of nonfeasance and misfeasance is left in a little confusion by the books, some expressions giving color to the positions advanced against us. It is said, for instance, that if one take charge of brandy, and spill a portion of it, which implies feissance, he is liable; but if the bailee, who receives it, totally omit doing any thing whatever by which it is lost or spilled, he is not liable. The latter position is not warranted by the cases. *Coggs v. Bernard* is, that the bailee is not liable if he do nothing; that is, if he never even receive the property. Suppose a revenue law required brandy to be deposited in a public store; or that, otherwise, it should be forfeited—I deliver the brandy, with the documents and key, to one, for the purpose of having it stored, and he staves the pipes and wastes the brandy—it is admitted he would be liable. Suppose, again, that he receives them, and then refuses to stir, by which the brandy is forfeited to the government, by reason of not being deposited: the loss is equally serious—the consideration equally adequate—and yet shall it be said the bailor must abide the loss? In *Elsee v. Gatward*, (5 T. R. 143, 148.) *Ld. Kenyon* recognized what *Powell, J.* said in *Coggs v. Bernard*,

that "an action will not lie for not doing a thing, for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act." So here, the defendants take the note, which is the same as a delivery of goods, and they are liable, no matter what name you give to the omission, whether *nonfeasance* or *misfeasance*.

ALBANY,  
April, 1824.  
Bank of Utica  
v.  
Smedes.

As to the clerical error in the first and second counts, which omit to set forth the time the notes had to run, it is true they are mentioned as bearing date on the 12th of August, and as being endorsed on the 14th of February; but the time is laid under a *scilicet*, and is immaterial. There can be no intendment that the notes were endorsed an hour before they were delivered, or that they lay an unreasonable time with the plaintiffs below. The proof must have been regular, and might have proceeded in total disregard of the time, which was mere form. Beside, it does not lie with the bank to say that a presentment and notice would do us no service, after having expressly promised, upon good consideration, to perform these acts for us. Being notes payable on demand, no particular time is fixed by the law, within which these acts should be done. The time, it is admitted, must depend on circumstances, which may, in certain cases, warrant a greater delay than 6 months. All this was proper matter of proof upon the trial. (*Loose v. Dunkin*, 7 John: Rep. 70. *Furman v. Haskin*, 2 Caines' Rep. 369. *Loomis v. Pulver*, 9 John. Rep. 244. *Hendricks v. Judah*, 1 id. 319. Various circumstances would excuse a delay of strict notice. It might have been waived by the endorser. These are matters which are never spread upon the record, and cannot come fairly in question here.

The statute under which the parties proceeded is sufficiently set forth; but if not so, the imperfection is cured by the verdict. Beside, we do not admit that acts in relation to banks are private. They are treated as public in all our judicial proceedings, where it has never been thought necessary to recite them at large. Our Courts have decided that their bills are a legal tender, unless specially objected.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

to, and their charters concern the currency of the country. (*Holland's case*, 4 Rep. 76. ——— v. ———, 2 Shower, 318, *Cade v. Hillary et al.* Lutw. 1407, 1410. *The King v. Buggs, Skin.* 428, 429.) In *The People v. The Utica Ins. Company*, (15 John. Rep. 363) in answer to an information in nature of a *quo warranto*, the defendants pleaded the act incorporating them as an insurance company, not as a private but a public act; and no exception was taken for this reason,

*S. A. Foot*, in reply. This is certainly a case of the first impression. There has been none, either in *England* or this country, where a bank has been charged under circumstances like the present. This Court are called upon to make a precedent, and I need not remark that it should be well considered. The single ground of complaint is, that the bank gave no notice to the endorser, by which the plaintiffs below sustained damage. The bank made an honest attempt to save the note, by employing an agent to give notice. Neither party are in moral default; and the case, therefore, presents a close contest, upon a legal question, which shall sustain the loss.

It is said we are estopped to call upon this Court for its interference, because we did not interpose our objections in the Court below. We present them with the record, and the opinion of the Court. How does it appear that we did not move in arrest of judgment? This is not to be determined by the assertion of counsel. Can it be ascertained by the printed opinion of the Court? Suppose there should be no formal opinion, or the Court below should forbear to notice what we did object there, must we be concluded? Is it meant that this Court cannot notice objections which that Court were pleased to think unimportant, and therefore did not mention? I see no other way, but to look at the record; see what objections might have been made; and consider them, at least, *prima facie*, as made. We are referred to *Colden v. Knickerbacker*, (2 Cowen's Rep. 31.) What was that case? The defendant had allowed judgment to pass by default; the question came up on a record of

the default ; and it was seen that he had not even placed himself in a condition to take the objections raised. The record must be the only test. The question can not be tried by affidavit. But if this be not so, and the Court should seek for the best lights they have, the opinion below, it does appear from this, that the objections upon the case related not only to the evidence, but the pleadings. Mr. Justice *Woodworth*, who gave the opinion, felt himself constrained to lay the first and second counts out of view as not reaching the case ; and to make the whole depend upon the third count. What does this mean, unless the pleadings were drawn in question ? Substantially, they were as much in question as here. The whole declaration was before the Court, who restricted the case to the third count. With leave of this Court, however, I shall consider all the questions which might have been raised in the Court below, relying upon the rule which I first advanced as the correct one.

It will not be denied that where one count is substantially defective, and the verdict is general, the judgment should be reversed. I would barely observe in relation to the first and second counts, that it is true, as contended by the other side, that the note should have been presented in a reasonable time ; and that this was matter of proof at the trial ; but the declaration should have averred expressly, that afterwards, to wit, on such a day, *being within a reasonable time after the making or endorsement*, they were presented for payment, and notice of non-payment given. The counts neither contain this averment, nor set forth the circumstances to shew whether these steps were taken in a reasonable time or not. Omitting this, no loss is shown, as a consequence of the default.

As to the third count, upon which the principal question arises, I shall not stop to review the cases, and draw the distinction between nonfeasance and misfeasance, because I am sure it will be found that Mr. Justice *Woodworth* assumed the sensible ground in the Court below. In a word, nonfeasance is not doing ; misfeasance is entering upon the undertaking, doing, but doing negligently. In the first case, a consideration is necessary ; in the latter, not. In the

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes,

first, the contract is merely honorary ; as to the second, if you will be kind and generous, and enter upon the act of kindness and generosity, you shall be holden to perform faithfully. If you merely say you will be so, it is a different thing. *Woodworth, J.* says, of this declaration, " the third count is the only one on which the plaintiffs can rely ; and that is for a nonfeasance, which cannot be supported, unless founded on a valid consideration." (20 *John. Rep.* 379.) To the same effect is the language of *Kent, Ch. Justice.* in *Thorn v. Deas*, (4 *John. Rep.* 99.) " But none of these cases," says he, " nor, as far as I can discover, do any of the *dicta* of the judges in them, go so far as to say, that an assumpsit would lie for the non-performance of a promise, without stating a consideration for the promise." *Woodworth, J.* also defines, and well defines, what shall constitute a consideration. It is either an injury to one party, or a benefit to the other ; (20 *John. Rep.* 380) that is, if the promisee be injured or the promisor benefitted. Here the single consideration is, that the plaintiffs below would endorse and deliver over the note to the defendants below for collection. Was this such a prejudice to the holders, or benefit to the bank as would make a binding consideration, and render them liable for omitting performance ? Neither the counsel, nor the Court below, pretended that this alone was sufficient ; but they put it on the ground of expectation. It was the probable, or expected benefit to the bank, arising from the course of their business, the hope that it would result in the receipt of the money due, and its temporary use ; and the Judge enters into a disquisition upon the manner of doing business in banks, to shew that the expectation was a reasonable one. But it is essential to the validity of the declaration, that not only the promise, but the consideration should be distinctly and fully set forth there. Now, the consideration mentioned, and relied on by the Court, does not appear in the third count at all. It is the act of endorsement and delivery ; not the expectation, which is averred. To conform to the opinion of the Court below, the addition should have been made, " and also in consideration of the use of the money to be received till withdrawn." The real consideration, upon which the



ALBANY,  
April, 1824.Bank of Utica  
v.  
Smedes.

Court below proceeded, is a perfect nonentity here. The Court below forgot this. They forgot that they could not rely upon a consideration not made the foundation of the judgment by pleading. It may be thought that the benefit to have been derived from the use of the money was not a distinct and independent fact necessary to be averred, but that it resulted from the allegation of endorsement and delivery. A moment's reflection will shew the contrary. It may be the course of the bank to keep such monies separate from the general fund; but whether they do so or not, is a question of fact. This may or may not be their practice. It depends on their mode of doing business; and the temporary use of the money may, or may not, result from its receipt. Again, it may be no benefit to the bank, even if it be intended that they would use it; or the benefit may not equal the risque of receiving, paying out, exchange, &c. If not, it can constitute no legal consideration. Thus, the temporary use itself, and the benefit of that use, are both of them independent facts, which it is necessary to aver; and it would introduce a singular laxity in pleading, to say that mere matters of proof shall be the subject of judicial intendment.

But suppose we are mistaken in saying that the consideration is not sufficiently set forth; will an expectation of benefit, from performing the promise, constitute a consideration? It appears to me that the case of *Elsee v. Gatward*, (5 T. R. 143) furnishes a complete answer. It can not be said that, in that case, a benefit was not equally matter of expectation from a performance by the promissor; yet all the Judges agreed that the promise was a *nudum pactum*. This case is stronger against the action than that. There the carpenter must certainly have been paid, if he had performed the services. Here, it is not pretended that the receipt of the money would have conferred any thing more than a contingent benefit. It might or might not have resulted in an advantage to the promissors. The benefit intended by the cases, which is to form a consideration, must be a benefit either actually received, or resting in a present, legal, vested right to it. Take the case, stated on the other side,

April, 1824.  
Bank of Utica  
v.  
Smedes.

of an attorney or counsel employed to manage a cause. The client tells his counsel, "I can not pay you; but the cause stands high on the calendar; and if you argue it ably, you will probably be retained in several causes which stand lower upon the same calendar." Suppose the counsel to promise upon such a consideration; would he be bound to perform? The case of the attorney directly retained is different. Certain fees are allowed him by the law; on his accepting a retainer, his client incurs the legal liability to pay those fees, and he must, therefore, appear and defend or prosecute according to his engagement, or pay damages for the neglect. So of common carriers. They are allowed, by law, certain fees; and it is enough, in complaining of nonfeasance, to allege that the defendant was a common carrier, or a common porter, and that the article was delivered by the promisee and accepted by the promisor. No other consideration is necessary, because, by the law, he may exact and enforce a reward. This is not so of the bank. It is not one of their legal duties to notify endorsers. This is the proper business of a notary publick. The bank can recover no reward, while the notary is entitled to his fees. The bank is like the carpenter, not the attorney, carrier or porter. *Ld. Kenyon* draws this very distinction in *Elsee v. Gatward*.

The endorsement and delivery, so far from being an injury to the plaintiffs below, was a benefit; and so intended by the parties. The note was payable at the bank. Suppose they had refused to receive it in any shape. The *Smedes* must have been at the expense of employing some other agent to attend at the bank during the whole third day of grace. The bank relieved them from this expense by engaging a notary.

Again; the bank of *Utica*, not being connected by any statute, which is set forth, with the bank at *Canandaigua*, the former can not be liable, unless it has assented to the latter doing business in this way for the former. All this should have been averred. The connexion between the two banks should have been exhibited upon the pleadings, either from a statute or a contract of agency. The rule is inflexible, that a

private statute must be set forth at large in pleading. (*Bac. Abr. statute, (F). Boyce v. Whitaker, Doug. 97. Dive v. Maningham, Plowd. 65. Read v. Potter, Cro. Jac. 139. Jenkins v. Union Turnp. Co. 1 Caines' Cas. Err. 93. Wright v. Paton, 10 John. Rep. 300. Holland's case, 4 Rep. 76.*)

ALBANY,  
April, 1824.  
Bank of Utica  
v.  
Smedes.

It is said, however, that all our objections to this declaration are cured by the verdict. The rule upon this head is, that if a matter essential in pleading be alleged in terms too general to stand the test of a demurrer, and a certain specific fact is necessary to support it, that fact will, after verdict, be intended to have been proved at the trial; but the rule goes no farther. The law will only imply means to substantiate a general allegation. This is what it means by a title defectively set forth. Here is a defective title. Nothing either general or special is alleged. The want of averring non-payment specifically may be cured by the rule, as to the effect of the verdict, but nothing more. The law knows nothing about individual rights, gifts, or franchises. If all the effects claimed from this verdict are to be recognized, it is certainly a most sovereign remedy. It will not only supply defects in a general allegation, but make a case out of whole cloth.

It is said this act is public, because it concerns the currency of the state. But this is very indirectly and distantly. The charter is still a franchise. Suppose a statute gives a private banker certain privileges; would the act be public, because it affects the currency? There is a clause at the end of almost every bank charter, declaring it a public act. Would this be necessary, if these acts are, in their own nature, public?

THE CHANCELLOR. The principal question raised in this cause, is one which was discussed before the supreme court, and was there determined. It is, whether any sufficient consideration for the promise stated in the third count, appears from the declaration, or not. Upon this question, I concur with the supreme court in their opinion, that this count is good, considered as a count for nonfeasance. The reasons of the supreme court, in support of this opinion, are

The principal question relates to the 3d count;

which is good either as a count for a nonfeasance, or misfeasance.

ALBANY,  
April. 1824.

Bank of Utica  
v.  
Smedes.

The other objections are not admissible here, because not made in the supreme court.

The corporation might contract, (keeping within the scope of its general powers) to do an act at any place.

It seems, a law incorporating a bank is a public act.

But the act authorizing an office of discount, &c. is sufficiently set forth.

just and conclusive. But the third count may also, I think, be as properly considered, a count for misfeasance. The truth of the transaction, even as it is stated in this count, was as much a mismanagement of the business undertaken, as it was a total neglect to perform it. The reception of the note by the bank for collection, may well be considered, as the first step in the execution of the contract, on their part, and in this view, no other consideration was necessary.

Upon the other objections made by the plaintiffs in error, it might be sufficient to say, that they do not appear to have been presented to the supreme court; and that by the decisions and practice of this court, such objections, can not be entertained here. I will however, state my opinion, upon some of the most important of those objections.

It is urged, that there is no public law, establishing an office of the bank of Utica, at Canandaigua; and that the act of the tenth day of April 1815, authorizing this bank to establish an office at Canandaigua, is a private act, which is not set forth in the declaration. The act incorporating the bank of Utica, is declared to be a public act; and the action is against this bank. This corporation may make any contract within the scope of its general powers, and may bind itself to do an act at Canandaigua, or any other place; and wherever the engagement may be broken, the bank will be equally liable. But I am not prepared to admit, that a law incorporating a bank, without declaring the law to be a public statute, is a private act, which must be recited in every suit against the corporation. These institutions are public, in their nature and character; and their operations affect the whole community. But without pursuing this inquiry, I am of opinion, that the act of the tenth day of April 1815, authorizing the bank of Utica to establish an office at Canandaigua, is sufficiently set forth in the declaration in this cause.

The declaration states, that the bank of Utica, had pursuant to the act of the legislature, passed the tenth day of April 1815, established an office of discount and deposit, in Canandaigua. This allegation, though not a full recital of the act, must be sufficient, at least, after a verdict.

Another objection is, that the note stated in the two first counts of the declaration, appears as a note payable on demand; and that it is not alleged, that any demand of payment from the makers, was made within a reasonable time. What was a reasonable time, would depend upon all the facts of the case, as they must have appeared at the trial. The decisive answer to this objection and to some others which have been urged, is, that they are made for the first time, after the trial of the cause and a verdict by a jury. All these objections may have been made, and all these defects if they are such, may have been supplied, by sufficient proofs at the trial. The established rules of our law authorize, and justice and public convenience, require, that the power of a verdict to cure formal defects in pleading, should be liberally applied.

I am accordingly of opinion, that the judgment of the supreme court, should be affirmed.

*The Court* being unanimously of this opinion, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be affirmed; and that the defendants in error, according to the statute in such case made and provided, recover their double costs for their defence of the writ of error to be taxed; and also their damages for the delay and vexation, to be assessed; which said damages shall be calculated at and after the rate of seven *per cent.* upon the amount of the judgment in the Supreme Court, so as aforesaid rendered, from the return of the *postea* in the Supreme Court, to the day of such assessment; and that the amount of such damages and costs be inserted in the *remittitur*; and that the record be remitted, &c.

ALBANY,  
April, 1824.

Bank of Utica  
v.  
Smedes.

It was not necessary to aver, in the 1st and 2d counts, that demand of payment was made of the makers within a reasonable time.

The notes being payable on demand, what is a reasonable time depended on all the facts, to be proved at the trial.

The power of a verdict to cure formal defects in pleading should be liberally applied.

ALBANY,  
April, 1824.

Barker

v.

The People.

JACOB BARKER, plaintiff in error,

against

THE PEOPLE OF THE STATE OF NEW-YORK, defendants in error.

The act to suppress duelling, passed *November 5, 1816, (sess. 40, ch. 1.)* which declares that any person convicted of challenging another to fight a duel, &c. "shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this state, is constitutional; and a conviction and judgment of disqualification under it, are, therefore, legal and valid.

The provision in the constitution of the *United States*, that cruel and unusual punishments shall not be inflicted, is a restriction upon the government of the *United States* only; and not upon the government of any state.

The constitution of the *United States* does not regulate the punishment of crimes against a state.

The state legislature can not establish arbitrary exclusions from office, or any general regulations requiring qualifications which the state constitution has not required.

The power of the state legislature, in the punishment of crimes, is not a special grant or limited authority, but a part of the legislative, or sovereign power of the state, to maintain social order, and to take life, liberty and all the rights of both when the sacrifice is necessary.

The provision in the state constitution, that the judgment upon impeachment shall not extend farther than a removal from office, and disqualification to hold office, is a restriction, not an authority.

The power of the state legislature, over crimes, is a power to produce the end by adequate means;

But there are numerous regulations in the constitution which operate as restrictions upon this power.

Examples.

Eligibility to office is not so secured.

Infliction of disqualification to hold office, as a punishment, is not incompatible with that part of the constitution, which provides that each house shall be the judge of the qualifications of its own members.

ERROR to the Supreme Court. In *February, 1822, Jacob Barker*, the plaintiff in error, was indicted in the Court of General Sessions of the Peace, of the city and county of *New-York*, for sending a challenge to *David Rogers*, to fight a duel. The indictment contained five counts; the four first of which alleged the offence to have been committed by *Barker*, in the city of *New-York*, on various days, in the

months of *January* and *February*, 1822, "against the form of the statute in such case made and provided," being founded on the act "to suppress duelling," passed the 5th of *November*, 1816. The fifth count was for a similar offence at common law. The plaintiff in error was tried on the indictment, at the Court of General Sessions, held in the city of *New York*, in *May*, 1822. The jury rendered a general verdict of guilty, and the District Attorney having entered a *nolle prosequi* on the fifth count, (for the offence at common law,) the Court, thereupon, gave judgment, that the plaintiff in error, "*for the offence aforesaid, as charged in the first, second, third, and fourth counts of the said indictment, whereof he is convicted, be incapable of holding, or being elected to any post of profit, trust or emolument, civil or military, under the state of New York.*"

A writ of error was brought, on this judgment, to the Supreme Court, which, in *January* term, 1823, affirmed the judgment of the General Sessions. (*Vide* 20 *John. Rep.* 457, *S. C.* which contains the reasons assigned to this Court in support of the judgment.)

*B. F. Butler*, for the plaintiff in error, argued,

1. That the act of the 5th *November*, 1816, "to suppress duelling, on which the judgment is founded, is contrary and repugnant to the provisions and spirit of the constitution of this state, in force at the time of its enactment.

2. It is also repugnant to the constitution of the *United States*.

3. It is repugnant to those parts of the amended constitution of this state, which relate to the *right of suffrage*, and which became in force, and took effect from the last day of *February*, 1822 ; and being so repugnant, was abrogated by the amended constitution.

He said, that, before an examination of the points, it might be useful briefly to consider the history of the act in question. The subject of duelling had, before the passage of this act, been presented in such a variety of lights to the legislature, that they felt themselves called upon for some vigorous provisions against it. The old statute of 1813, (2 *R.*

ALBANY,  
April, 1824.

Barker  
v.  
The People.

ALBANY,  
 April, 1824.  
 ~~~~~  
 Barker
 v.
 The People.

§. 192,) being found ineffectual, the act of *November 5, 1816, (sess. 40, ch. 1.)* passed the two houses at the previous winter session; and was sent to the council of revision. This act, beside imposing the penalty of disfranchisement, for sending a challenge, &c. provided that an oath should be taken by all officers afterwards appointed, and solicitors, attorneys, counsel, &c. afterwards admitted, that they had not and would not violate the act. This was by the second section; and doubts being entertained as to its constitutionality, it was laid over among the files of the council, till the *November* session, at which time it was approved by a majority of the council, and became a law from that date. Notwithstanding this decision of the council, doubts were still entertained as to its constitutionality; and in the case of *Dox*, a member of the assembly from *Genessee*, the question was discussed in the legislature, and he was denied a seat, because he would not take the oath. A few days after this, a bill passed the assembly repealing the 2d section, but it was rejected by the senate. During the pendency of the bill, the constitutional power of the legislature to make such a law was fully discussed; but the objection was confined to the second section. At the session of the late convention, however, the subject was taken up; the 6th article of the new constitution abolishes the oath; and whatever might have been thought on this subject before, it is now, we believe, pretty generally conceded, that the second section, at least, was unconstitutional. This history is useful, as it establishes, that, in the fervor of the times, the constitution was violated in the second section; and admonishes us, that, from the same cause, it might possibly have been violated in the first.

In discussing the points proposed, it is proper to inquire, generally, what power the legislature possess under the constitution of this state. The late Chief Justice, in delivering the opinion of the Court below, says, that they possess all power, not expressly forbidden by the constitution of this state, or of the *United States*, which relates to the prevention of crime, or the well ordering of society. From this, we, with very great deference, dissent. We contend that they possess the power, only, which is expressly conferred by

ALBANY,
April, 1824.Barker
v.
The People.

the constitution, or that which results from its provisions by necessary implication. This construction has universally been applied to the constitution of the *United States*. It is said, by the Chief Justice, not to apply here, because our state constitution contains no enumeration of powers. There are but few prohibitions in the state constitution. Our rule admits that when the legislature are not expressly prohibited, they possess all power not repugnant to any express provision, or the fundamental principles of a free government, or in other words, the spirit of the constitution. Thus, the true rule will be found to lie between the two extremes of a power limited by enumeration, or left entirely at large. Indeed, this rule is admitted, in effect, by the Chief Justice; for, notwithstanding the broad terms of the axiom with which he sets out, he goes on to argue that there is no repugnancy between the provisions of the act and those of the constitution; at any rate, beyond that provision which makes the assembly judges of their own members. He admits that such a repugnancy would destroy the act *pro tanto*. The 3d article of the original constitution, erecting a council of revision, with powers to guard against the passage of laws contrary to the spirit of the constitution, implies also that such a distinction exists. There are certain acts which the legislature cannot pass, though not expressly prohibited, and though not inconsistent with any express provision of the constitution. (*Calder et ux. v. Bull et ux.* 3 Dall. 386. *Fletcher v. Peck*, 6 Cranch, 87, 135. *Green v. Biddle*, 8 Wheat. 1, 88.) There is nothing which prohibits divesting one man of his freehold and giving it to another; no provision against retrospective laws; yet no law can be passed divesting a freehold; because it is inconsistent with those principles of liberty on which all free governments are founded.

We contend that the act of *November 5th*, 1816, was contrary to several express provisions of the original constitution, particularly the 9th, 10th and 12th articles. The first clause of the 9th article makes the assembly judges of its own members. No particular qualification was required

ALBANY,
April, 1824.

Barker
v.
The People.

in a candidate for that house ; though it was perhaps implied that they should have the same qualifications as the elector. But the 10th section required a senator to be a freeholder, which could not be varied by any act of legislation. Could they, for instance, have defined the qualification more particularly by saying that the freehold intended should amount to \$250 ? This would violate the rule that an express provision excludes implication. If the legislature had power to require other qualifications, they might subvert the freedom of election. In effect, the duelling act did require a qualification unknown to the constitution. On the 1st of January, 1822, the plaintiff in error was eligible to a seat in the assembly or senate. In the latter, he once held a seat. He is now, according to the judgment of a Court of Sessions, ineligible to either branch of the legislature. How has he become so ? The constitution does not recognize the disqualification imposed. It is the same thing as an act requiring 20 years residence of the candidate in a particular county, or a freehold of the value of \$1000, or the membership of a cotton factory, as a qualification. Suppose he should present himself to the house of assembly as a member of that body, could they say, "you have all the constitutional qualifications, all which the people required, but not such as the legislature have seen proper to demand ;" and for that reason exclude him ? Do the house of assembly longer retain the power of judging in cases coming within this act ? No. If the act be valid, their power is discontinued ; and the judiciary are to determine the qualifications of members. The late Chief Justice seems to admit that this consequence could not follow ; and that the act is so far void. The 17th and 20th articles, prescribing the qualifications of the governor and lieutenant governor, are equally violated. So of the 29th article, providing that town officers, &c. shall be continued eligible as heretofore ; though there may be some doubt whether this be not confined merely to the manner of their election. The utmost extent of legislative power is to render a man ineligible to such offices alone as are created by the legislature, or left by the constitution for them to create or control.

Can this judgment be good in part and void in part? The late Ch. Justice seems to think it may; and this is true even in criminal cases where the judgment consists of several distinct and independent branches; as where it imposes a fine of 15 dollars, and imprisons for 30 days, (*In the matter of Sweatman*, 1 *Cowen's Rep.* 144.) So in civil cases, where it is divided into costs and damages; but when the judgment is entire, and the good can not be distinguished from the bad, it must be reversed *in toto*.

This act is also repugnant to the 13th article, which forbids the disfranchisement of any member of this state, unless by the law of the land or the judgment of his peers. On this head, the late Chief Justice remarks, that "if the duelling act is not otherwise unconstitutional, then the injunctions of this article have been complied with; for the act is the law of the land, and the verdict is the judgment of the plaintiff's peers." This is a plain case of the *petitio principii*; for though the judgment was under a statute, it does not follow that the proceeding was according to the law of the land, unless the act was constitutional. If it violated the constitution, it was void, and the trial was not such an one by the plaintiff's peers as is known to the law. It is begging the whole question in controversy. Suppose the legislature to pass a law divesting you of the title to one of your farms, and conferring it upon your neighbor; this is equally the law of the land, because it has the form of an act of the legislature. Suppose they should pass an agrarian law, providing that no man shall hold more than 100 acres of land; but if he buys more, it shall be forfeited to his nearest neighbor who has no land; and a jury should find this fact, and a Court give judgment of forfeiture; this would be equally an ouster of private right by the law of the land, and the judgment of his peers. The act must be not only formally, but constitutionally good, or any act which your peers may do under it is a nullity, and as if they had never acted at all.

The late Chief Justice said he did not perceive the application of the 33d article. It was expressly stated by the plaintiff, in his argument before the Court below, that this article confined the disfranchisement or sentence of inelegi-

ALBANY
April, 182

Barker
v.
The People

bility to the impeaching power. (*Vid.* 20 John. 457.) It gives this power to the senate ; and the plaintiff wishes to be understood as contending, that when a constitution or statute creates a power, and places it in the hands of a particular tribunal, to be exercised in a particular manner, all other tribunals, and all other courses of proceeding, other than those which are enumerated, are virtually excluded.

The late Chief Justice himself thinks, that the enumeration of offences in the new constitution, for which one may be deprived of his vote, excludes, by necessary implication, all others. Now, by the 39th article of the old constitution, ministers of the gospel were ineligible. Take the late Chief Justice's own rule, that this enumeration excludes all other causes of ineligibility ; and this article, alone, would be sufficient ground from which to infer the invalidity of the judgment below. Suppose the legislature should exclude other classes—lawyers or physicians, for instance—would the provision be valid ? Here they have excluded duellists, who, at times, form a very considerable class of the community.

The act is repugnant to the spirit of the constitution. We have already explained what we mean by this. It is a repugnancy to those principles which lie at the bottom of every free government. We do not believe that the people ever intended to confer this arbitrary power of disfranchisement. We do not believe it, because the power is too mighty to be entrusted with any republican legislature. If they do possess it, they are omnipotent, like the British parliament, and able to subvert the liberties of the people. If they may disfranchise in this, they may in any other case. A simple assault and battery is an offence of the same legal grade as sending a challenge, not to mention a great number of other ordinary misdemeanors of the same rank, some of which are committed very frequently, and almost with impunity. The legislature may go on in this way, without end, disfranchising one and another, till the state would be reduced to very narrow limits in its selection of officers. Working, sporting, or travelling on *Sunday*, or profane cursing and swearing, may be followed by the same consequences. They may create new offences, and impose ineligibility, by

their acts, to protect game and fisheries. We are not to repose on the remoteness of the probability that these things will come to pass. It is the power which is in question—not what they will do, but what they may do. Did the people who delegated the right to frame our original constitution, suffering as they were at the moment under the lawless encroachments of British myrmidons, intend to leave this matter at such loose ends, entrusting their legislature with a power to disfranchise the whole community?

ALBANY,
April, 1824.
Barker
v.
The People.

Another fundamental principle of all free governments is, that punishments shall be proportioned to the nature of the offence. This is so treated not only by all enlightened writers on the subject, but it is incorporated as a maxim in various constitutions of the *United States*. Cruel or unusual punishments are not to be inflicted. (8 *Am. to Con. U. S.* 18 art. *Bill of Rights in Con. N. H.* 14 s. of 8th art. *Con. Ohio*.) And though not, in terms, a part of our state constitution, it is one of its fundamental principles, as much as the rule that the freehold of one man shall not be arbitrarily divested and conferred upon another. We do not speak of the power to prescribe punishments, cruel or unusual in themselves, but the act of imposing penalties, of the same undistinguished severity, upon all offences, without distinction as to their nature. The statute in question imposes the same penalty on all who commit the offence of sending a challenge, whatever may be its extenuating circumstances, in whatever class of society it may be committed, whether among the bar, the army, the navy, &c. All are alike disqualified from becoming members of the legislature. The man against whom the sentence is pronounced becomes a slave in a nation of freemen, for an offence which, under some circumstances, should be excused. Its moral guilt depends upon those circumstances. This law, like the tyranny of *Procrustes*, seizes the victim, and adapts him to the bed of justice. A whole life of atonement, for a juvenile freak, can not rescue him from lasting disfranchisement and disgrace. No matter how warm the blood, or great the provocation—whether the challenge be given or accepted—and though the challenge or acceptance be immediately withdrawn—the

ALBANY,
April, 1824.

Barker
v.
The People.

same consequences follow. Such a law violates the eternal principles of morality and of natural justice itself.

It is said, by the late Chief Justice, that disfranchisement is not an unusual punishment. He does not allude to ineligibility ; and we think he is mistaken in saying so of disfranchisement, inflicted by the legislature. We presume he must have alluded to attainders, which are now prohibited by the constitution of the *U. States*. He says it was the consequence of treason and of infamous crimes ; but, at any rate, such a consequence is very different from ineligibility. Till the adoption of the late constitution, there was nothing of this to prevent a citizen's voting or being elected. Again ; it may be answered, that he speaks of the matter as it stood at the common law, which, though adopted by the constitution, is, in this respect, altered by the bill of rights. Probably the statute, (1 *W. & M. c.* 2) which passed in *England*, containing the same clause, referred to certain cruel punishments which were inflicted about the last of the second *James*. (4 *Bl. Com.* 378.) But these had long been discontinued, and were not known in this free country, when it was reiterated by the constitution of the *United States*, and the declaration of rights in our own state. (1 *R. L.* 48, s. 8.) The punishment in question was unknown to the common law, as it respects this offence. So far, at least, it was unusual ; and we have already shown, that applying it to a crime of this grade is cruel.

All the arguments drawn from the old, apply with still greater force under the new constitution. The trial in the Court of Sessions took place in *May*, 1822 ; and, by the 9th article of the amended constitution, all its parts which relate to the right of suffrage and the time of election, were then in force. By the 2d section of the 2d article, laws may be passed excluding from the right of suffrage persons who had been or might be convicted of infamous crimes. The late Chief Justice admits, that this enumeration, by necessary implication, denies the power in any other cases ; and that the offence of which the plaintiff has been convicted is not an infamous one ; but he limits its operation to the direct right of suffrage, and distinguishes this from eligibility. We

do not contend that the right of voting and being voted for are convertible ; but we do contend that they are common, and that the citizen who has one must necessarily enjoy the other. We shall not stop to comment on the right of suffrage, or examine the full import of the term. It may certainly be extended, however, to the right of voting in the legislature upon the passage of a law ; but we are willing to concede, for the purpose of the present argument, that it means voting at an election. Now, though you may deprive the plaintiff of his own personal vote, you can not deny his fellow citizens the right to vote for him—nor the right to vote for himself ; which, under certain circumstances, might become a duty. If the legislature can disqualify for one offence, they may for another ; and thus the argument returns, that this may be extended from one to an hundred, and so on to every member of the community.

In determining a constitutional question of this character, which concerns the liberty of the citizen, every construction should be in favour of that liberty ; and if a doubt exist in the mind of the Court, this great principle should be applied, and judgment be rendered for the plaintiff in error.

Talcott, (Attorney General) for the defendants in error. The question for the Court to decide is not whether the act under consideration, or any part of it, be inexpedient, but whether the legislature had a constitutional power to pass the particular section in question. I do not controvert the right of this or any other Court, to entertain the inquiry. I admit it is their duty—but I do say, that the Court will come to a conclusion against the validity of the statute, upon such grounds, with great reluctance ; and not till all doubt be removed from their minds. (*Dartmouth College v. Woodward*, 4 *Wheat.* 625. *Calder et ux. v. Bull et ux. per Iredell*, J. 3 *Dall.* 399.) I do not controvert the gentleman's limitation of legislative power to that which is consistent both with the letter and spirit of the constitution. It is not necessary for me to contend that the legislature have any power inconsistent either with its words or its spirit, or which is repugnant to the principles of civil liberty. This

ALBANY,
April, 1824.

Barker
v.
The People.

ALBANY,
April, 1824.


Barker
v.
The People.

act is perfectly consistent with all three ; and, in showing it to be so, I shall not follow the gentleman, with any minuteness, into his doctrine of remote consequences, or examine the force of the language in all the various constitutional provisions which he has considered ; but I shall rely mainly on the evidence to be derived from practical construction, by men who have framed and acted upon constitutions containing the same principles with our own. In *New-Jersey*, an attempt to bribe a Judge or Justice, is punished with fine and imprisonment, and disqualification to hold any office of honor, trust or profit, under that state. (*Laws N. J.* 1821, p. 249, 250.) In *Pennsylvania*, sending or carrying a challenge for, or becoming a second in a duel, is punished with forfeiture of all the rights of citizenship for 7 years. (*4 Laws Penn.* 389, act of 1794.) The act of 1806, 7 *Laws Penn.* 665-6) re enacts this law, as to persons sending or accepting a challenge ; and, as to persons carrying, it does not deprive them of *all rights of citizenship*, but only disqualifies them to hold any office of trust or profit under the commonwealth. In *Delaware*, a person elected member of assembly, upon a promise to serve for nothing, or less than the law allows for services, is declared by statute incapable of serving for that year. (1 *Laws Del.* 148.) In *Virginia*, by a law of 1695, (*vid.* 1 *Statutes at Large*, 131) collectors and their officers receiving, and persons giving bribes, were declared forever incapable of any office or employment within the colony ; and the same disqualification followed, for bribery in relation to any other duties concerning the customs. (*id.* 191.) In 1705, a law passed, that collectors, &c. receiving a bribe to defraud the customs, should forever afterwards be disabled from holding the office, and also be disabled from holding any office or employment relating to the customs. (3 *id.* 232.) In 1785, a law was passed, that if any person elected to serve in the general assembly, should bribe an elector, he should be expelled, and disabled to be re elected during the term of 3 years. (1 *Rev. Code*, 22.) By a law of 1790, the penalty declared for selling a public office, or for taking any thing for a vote in the appointing to any such office, was, in one case, the

ALBANY,
April, 1834.Barker
The People.

loss of the office held, and in the other, incapacity of voting for any candidate for the office sold ; and, if the offender was a member of assembly, expulsion and perpetual disqualification from being elected ; and the person agreeing to buy was declared incapable of serving in the office purchased. (1 *Rev. Code*, 52.) Another law declared, that if candidates for the legislature gave money, meat, drink, or other reward, to promote their election, they should be expelled, and disabled to be elected for 3 years. (1 *Rev. Code*, 389.) By a law of 1810, an oath similar to the one prescribed by the act in question here, was made necessary for all officers ; and a challenger, or acceptor of a challenge, was made incapable of holding or being elected to any post of profit, trust or emolument, civil or military. The statute of *Connecticut* is to the same effect. (*Rev. Law. Con.* 1821, p. 161, s. 52, 53.) So of *Vermont*. (*A. D.* 1801, 1 *Laws of V.* 367) whose statute also denies the offender the privilege of a freeman generally. (*id.*) The statute of *Massachusetts* is the same, except in limiting the disqualification to 20 years. (1 *vol. Laws Mass.* 367, *A. D.* 1801.) The oath prescribed by the statute of *Illinois*, on this subject, is like ours ; and the offender is made incapable of holding, or being elected to any post of profit, trust or emolument, civil or military. (*A. D.* 1819, *Laws of Illi.* 32.) By a statute of the *United States*, if any person give any bribe or reward, to obtain a judgment or decree of a *U. S.* Judge, on any matter in controversy, both the giver and receiver are subject to fine and imprisonment, at the discretion of the Court, and are perpetually disqualified, by conviction, to hold any office of trust or profit under the *United States*. (2 *L. U. S. Colvin's ed.* 97, s. 21, *A. D.* 1790.)

If the statute in question be a violation of the fundamental principles of free government, it is singular that almost every statute book in the *United States* should exhibit examples of the same extravagance, among jurists profound in their learning, and patriots ardent in their attachment to liberty.

Too much stress is laid, by the other side, upon an enumeration of particular qualifications. The Governor, says the original constitution, must be a freeholder. This certainly disqualifies those who are not freeholders; but does it also imply that no other disqualification can exist beyond the one mentioned? The 13th article declares, that no citizen of this state shall be disfranchised, unless by the law of the land, or the judgment of his peers. There is a similar provision in the constitution of the *United States*. The argument of the late Chief Justice, on this head, it seems, is to be a *petitio principii*. There will be little difficulty, I imagine, in determining between the gentleman and the Chief Justice, whether he who assumes the act to be constitutional, and therefore good, or the one who assumes it to be unconstitutional, and therefore void, may be fairly charged with begging the question. The 33d article, which relates to impeachments, is no more than what the constitution of the *United States* contains; the 8th amendment of which also provides, that cruel and unusual punishments shall not be inflicted. If ineligibility be a cruel and unusual punishment, as supposed upon the other side, the 8th amendment would repeal that branch of the same constitution which sanctions disqualification as one consequence of a conviction upon impeachment. The several states have gone on, in the face of these provisions in the constitution of the *United States*, imposing disfranchisement and ineligibility in the same manner as is done by the statute in question.

It is said, that punishments should be proportioned to the nature of the offence. This is obviously a mere question of expediency. Indeed, the argument demands what can never be exactly reached by any human code. How is the punishment of any crime to be proportioned to all the circumstances of each particular case? A man may be guilty of burglary in various degrees, yet the punishment is the same in each. One starving in the streets breaks a house for bread—is he equally guilty with the one who does the same without motive? Executive clemency, alone, can grant relief, and to that it is reserved.

ALBANY,
April, 1824.Barker
v.
The People.

We are told, that this act is repugnant to that part of the constitution which determines the right of suffrage. It appears to me that this objection is answered most conclusively by the late Chief Justice. The complaint is, that we contract the right of the voter. All that this proves is, that the person disqualified is placed in the same situation as every other person ; who, if he votes for one that is ineligible, loses his vote. The alarm, it seems, is, that this sentence of ineligibility may be extended to every member of the community. But what is the nature of our government ? It lays out general lines—it can not reach every case, or look to every extreme. The late Chief Justice places this matter upon its proper ground. The legislature have power to pass all laws for the well ordering of society, which are not forbidden by the constitution. The gentleman supposes extreme cases, to which the legislature never can go. They must enjoy an extensive discretion in every government ; and, it is true, that any system may be abused ; but by reasoning against the possible abuse of power, we deny all power except that of Deity. Even the christian religion has been perverted to the worst of purposes. When we come to the point supposed by the gentleman, there is a redeeming spirit in the people, which will restrain and correct those who feel power and forget right.

Butler, in reply. The amount of the gentleman's argument, as derived from other states, is, that because they have violated the constitution, or the fundamental principles of government, we may, therefore, do the same. It is not necessary to look beyond our own constitution, and that of the *United States*. But when we do, we find but two classes of cases in which disfranchisement and ineligibility have been sanctioned by statutes. These are cases of duelling and bribery, from which we must except all the statutes which passed under the colonial governments, they being instances which certainly carry no force, as examples, to legislators who act under the new constitutions. Beside, the statutes passed upon these subjects since, must stand or fall by the provisions of the particular state constitution under which

ALBANY,
April, 1824.

Barker
v.
The People.

they passed. Some of the constitutions in the neighboring states are broader than ours on this head. Their laws, too, in relation to duelling, have doubtless grown out of the effervescence of the moment, like ours ; and they have never been enforced. In *Maryland*, the legislature has lately repealed such a law, as unconstitutional. All the state laws, in relation to duelling, probably stand on the same ground both of principle and policy. This is the first time the question upon their validity has been raised any where ; and, as to bribery, though the constitution gives no express authority to punish it by *disfranchisement* or ineligibility, there are sufficient indications, in almost all the constitutions, of an intent to confer such a power. Indeed, it is consistent with the very terms of some of them. The question, however, as to the validity of any of these statutes, has not been judicially passed upon, and I deny the force of such proof.

When I urged the danger that the rights of suffrage might be impaired or destroyed by multiplying cases of ineligibility, I expected to be met with the objection of extreme cases. The Attorney General does not and will not deny, that if the legislature have power, in the case under consideration, to inflict the punishment of ineligibility, they have it equally in all others, in assault and battery or any other common law offences. Can the consequence suggested, then, be properly called an extreme case ? It seems that our security must lie in the patriotism and intelligence of the legislature, or the control of their constituents. We say, the people have not chosen to rest it there. The security of their liberties reposes upon the provisions of their constitution, express or implied—a surer and better foundation.

I thank the Attorney General for his allusion to the abuses of the christian religion, in one of his illustrations, and will pursue it. I put the case of the legislature annexing this punishment of ineligibility to the violation of the christian sabbath, or to profane swearing. Is it supposing an extreme case, to say that they may, within 40 years, impose this disability as a punishment for those very common offences ? Had the same thing been supposed, when the original constitution was adopted, in relation to this offence of

sending a challenge, might it not have been treated as an extreme case with just as much propriety? Yet the force of circumstances has produced this act, and may, with just as much probability, result in the same thing, with regard to a breach of the sabbath. No doubt there are many who think a violation of the christian sabbath an offence great as sending a challenge, at least, under some circumstances. Suppose a similar statute in relation to the former offence, (it was, too, an offence at common law) could it be maintained as constitutional? If so, the very abuses of religion to which the Attorney General alludes, may return upon us.

ALBANY,
April, 1824.

Barker
v.
The People.

THE CHANCELLOR. The first section of the act of the fifth of November 1816, to suppress duelling, prescribes, that "the person convicted shall be incapable of holding or "being elected to any post of profit, trust or emolument, "civil or military, under this state:" and the objection now made, is, that this punishment is inconsistent with the constitution.

The constitution of the United States provides, that cruel and unusual punishments shall not be inflicted. This provision is one of the amendments to that constitution, which were adopted soon after the constitution itself had been ratified. Like other amendments adopted at the same time, it is a restriction upon the government of the United States, intended to deprive that government of a power, which it had or might claim, under the original constitution. In the language which accompanied these amendments, when they were proposed and adopted; "these farther declaratory and "restrictive clauses were added to the constitution, in order to prevent misconstruction, or abuse of its powers." The solicitude of the people and of the states, then was, not to limit the power of the states, but to limit the power of the union, and by new provisions to give security to rights, which were supposed to be in danger from the new and untried system of national government. The danger apprehended, was by the parts from the new government of the whole; and not by any state from its own government. Each state was then at liberty, as it now is, to provide by its

The provision in the constitution of the United States, that cruel and unusual punishments shall not be inflicted, is a restriction upon the government of the United States only; and not upon the government of any state.

ALBANY,
April, 1824.

Barker
v.
The People.

own constitution, that cruel and unusual punishments shall not be inflicted by its own government. Accordingly, several of the states, in their constitutions established since the adoption of this amendment to the constitution of the union, have provided, that cruel and unusual punishments shall not be inflicted. This provision is found in the constitutions of Ohio, Tennessee, Indiana, and Maine. The constitutions of Delaware, Kentucky, Mississippi, and Alabama, also established since the adoption of the amendment in question, provide, that cruel punishments shall not be inflicted. Other state constitutions are silent upon the subject of punishments, either cruel or unusual. It is most evident, that the states which have imposed these restraints upon their own governments, conceived, that they were at liberty to do so, or not; and that in their conception, the constitution of the union, contained no such restraints upon state governments, in the punishment of crimes against states. To consider this amendment as operating upon the several states, would be to render nugatory and null, the like provision in the constitutions of very many of the states; and at the same time, to force upon all the states which have not adopted such a provision, a rule which they may think inexpedient, and which they at least, have thought unnecessary, in their own internal economy. This provision concerning punishments, is therefore, as a part of the constitution of the union, a restriction upon the government of the union; and as a part of any state constitution, it is a restriction upon the government of the state which has established it. The constitution of this state, imposes no such restriction upon punishments. Without inquiring whether disqualification to hold office, is a punishment either cruel or unusual, I consider this provision of the national constitution, inapplicable to offences against a state.

The constitution of the U. S. does not regulate the punishment of crimes against a state.

The constitution of the United States provides, that no state shall pass any bill of attainder, or ex post facto law; but that constitution does not regulate the punishment of crimes against a state.

In considering the question before us, it seems to me to be of little importance, whether we examine it, in reference

ALBANY,
April, 1824.

Barker
v.
The People.

qualifications, which the constitution has not required. If, for example, it should be enacted by law, that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts; or that all persons not possessing a certain amount of property, should be excluded; or that a member of the assembly must be a freeholder; any such regulation, would be an infringement of the constitution, and it would be so, because, should it prevail, it would be in effect, an alteration of the constitution itself. But the question before us, is not at all, of this character. The legislature have made no such general regulation. They have prescribed, that incapacity to hold public trusts, shall be the punishment of a particular crime; and the question here is, whether they have power to prescribe such an incapacity, as a punishment, or not.

The power of the state legislature, in the punishment of crimes, is not a special grant or limited authority, but a part of the legislative or sovereign power of the state, to maintain social order, and to take life, liberty and all the rights of both, when the sacrifice is necessary.

The power of the legislature in the punishment of crimes, is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of "the legislative power of this state," mentioned in the first sentence of the constitution. It is the sovereign power of a state, to maintain social order, by laws for the due punishment of crimes. It is a power to take life, and liberty, and all the rights of both, when the sacrifice is necessary to the peace, order, and safety of the community. This general authority is vested in the legislature, and as it is one of the most ample of their powers, its due exercise is among the highest of their duties. When an offender is imprisoned, he is deprived of the exercise of most of the rights of a citizen; and when he suffers death, all his rights are extinguished. The legislature have power to prescribe imprisonment or death, as the punishment of any offence. The rights of a citizen, are thus subject to the power of the state, in the punishment of crimes; and the restrictions of the constitution upon this, as upon all the general powers of the government, are, that no citizen shall be deprived of his rights, unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty or property, without due process of law.

The provision in the state constitution, that the judgment upon impeachment shall not extend farther than a removal from office, and disqualification to hold office, is a restriction, not an authority.

The constitution has, in one case, limited punishment. When an officer of the state, is convicted upon impeachment, the judgment can not extend farther than removal from office and disqualification to hold office. This provision stands here, a restriction, not an authority. As the punishment is not to extend farther, than removal and disqualification, the sense of the terms, and the known course of proceedings in the country from which we derive the history and practice of impeachments, both show, that this provision is a mere limitation of a greater power, a power to inflict other punishments, as well as removal and disqualification. Impeachments of public officers, a peculiar species of accusation, made and tried in a peculiar manner, are to extend no farther in their effect, than to discharge an officer from his trust, and to render him incapable of holding office; but if the cause, for which the officer is thus punished, is a public offence, he may be also, indicted, tried, and punished, according to law; the constitution leaving the definition of the offence, and its particular punishment, in this case, as in all others, to the general power of the legislature. This part of the constitution concerning judgment on impeachments, is therefore, a limitation of the power of the court for the trial of impeachments; and not a restriction upon the general power of the legislature over crimes.

The power of the state over crimes, is thus committed to the legislature, without a definition of any crime, without a description of any punishment to be adopted, or to be rejected, and without any direction to the legislature concerning punishments. It is then, a power to produce the end by adequate means; a power to establish a criminal code, with competent sanctions; a power to define crimes and prescribe punishments by laws, in the discretion of the legislature.

The power of the state legislature, over crimes, is a power to produce the end by adequate means.

But though no crime is defined in the constitution, and no species of punishment is specially forbidden, to the legislature, yet there are numerous regulations of the constitution which must operate as restrictions upon this general power. The whole constitution must be supported; and all its powers and rules must be reconciled into concord.

But there are numerous regulations in the constitution, which operate as restrictions upon this power.

ALBANY,
April, 1824.

Barker
v.
The People.
Examples.

Many rights
are intended to
be fundamen-
tal and invio-
lable.

Examples.

Eligibility to
office is not so
secured.

A law which should declare it a crime, to exercise any fundamental right of the constitution, as the right of suffrage, or the free exercise of religious worship, would infringe an express rule of the system; and would therefore, not be within the general power over crimes. Particular punishments would also encroach upon rules and rights established by the constitution. Though the legislature have an undoubted power to prescribe capital punishment, and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights, would, even as a punishment, be, in many cases, repugnant to rules and rights expressly established. Many rights are plainly expressed, and intended to be fundamental and inviolable, in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right, could not be allowed, in the form of a punishment. Any other right thus secured, as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all; to criminals, as well as to others; and a punishment consisting solely, in the deprivation of such a right, would be an evident infringement of the constitution. Any punishment operating as an infringement of some rule thus expressly established, or some right thus expressly secured, would be unconstitutional; and all punishments which do not subvert such rules and rights of the constitution, are within the scope and choice of the legislative power.

But while many rights are consecrated, as universal and inviolable, the right of eligibility to office, is not so secured. It is not one of the express rules of the constitution, and is not declared as a right, or mentioned in terms as a principle, in any part of the instrument. Important as this right is, it stands, as the right to life itself stands, subject to the general power of the legislature, over crimes and punishments. As a right flowing from the constitution, it can not be taken away by any law declaring that classes of men, or even a single person not convicted of a public offence, shall be ineligible to public stations; but as a right not expressly secured by the consti-

tution, it may be taken from convicted criminals when the legislature in their plenary power over crimes, deem such a deprivation, a necessary punishment. To say this, is to say in substance, that the right in question, may be forfeited by crimes, when the legislature so direct. If this right is taken from none but malefactors, in punishment for offences declared by law, and ascertained in the due course of justice, the sense of the whole constitution, is maintained : and the public, it may be presumed, will not find their choice of agents much abridged by the exclusions from office, which their own legislators, courts and juries may thus add to those specified in the constitution.

Each house of the legislature is the judge of the qualifications of its own members ; and it is said, that this provision of the constitution, is infringed, by the disqualification in question. The sense of this provision is, that each house shall decide upon the qualifications of its own members without interference or control from any other authority ; but this part of the constitution does not define any qualification which shall be allowed or required by either house. The only qualification made requisite by the constitution for a senator, is that he shall be a freeholder ; and in respect to members of the assembly, no qualification whatever is required by the constitution. Whether the legislature can exclude from public trusts any person not excluded by the express rules of the constitution, is the question which I have already examined : and according to my views of that question, there may be an exclusion by law, in punishment for crimes ; but in no other manner, and for no other cause. If then a disqualification for crime, is constitutional, each house of the legislature, bound to support the constitution, would give effect to the disqualification. But as the authority of each house is exclusive and supreme in all questions concerning the qualifications of its own members, if either house should consider such a disqualification unconstitutional, or for any reason whatever, should disregard it, the opinion of the house would prevail, in respect to the seat and rights of any member declared ineligible by the courts. The disqualification pronounced by the courts, would then

ALBANY,
April, 1824.

Barker
v.
The People.

Infliction of
disqualification
to hold office,
as a punishment,
is not incompatible
with that part
of the constitution
which provides that
each house
shall be the
judge of the
qualifications
of its own
members.

ALBANY,
April, 1824.

Barker
v.
The People.

fail to produce an exclusion from the legislature ; but it would nevertheless, be effectual to exclude from all other public stations. Its effect in respect to all other public employments, must be decided by the tribunals of justice. Thus, the same question, must for different objects, receive decisions from different jurisdictions ; and under one constitution and one system of laws, the same decision may be expected from all the public authorities. But if the senate or the assembly on one side, and the courts of justice on the other, should make opposite decisions respecting such a disqualification, both decisions would prevail in different respects. The power of each house of the legislature to judge of the qualifications of its own members, does not determine or illustrate what is, or is not a qualification ; the statute to suppress duelling, does not propose to deprive, nor can any law deprive the several houses of the legislature of their exclusive jurisdiction ; and this part of the constitution, is therefore not infringed by the judgment of disqualification now in question.

It has been strongly urged, that the power to prescribe this species of punishment may be abused. That such a power may be abused, can not be denied ; since all power entrusted to men, is subject to abuse. The power to declare crimes and prescribe punishments, is high, indefinite, and discretionary ; and therefore affords ample room for abuse. Yet the legislature by their acts, instead of any tendency to severity, show a strong disposition to mildness, in the use of their power over crimes and punishments. That disqualification to hold public trusts, will become a frequent punishment, seems not probable ; the legislature having hitherto adopted this punishment, only in the two cases of bribery and duels. But whatever may be the danger of abuse, the punishment itself is not unconstitutional. The remedy for abuse of the legislative power, in enacting laws which may be unwise, while they are not unconstitutional, is not in the courts of justice. It is found in other parts of the system, in frequent elections and in the due course of the legislative power itself, which alike enacts and repeals laws, in pursuance of public opinion. That this punish-

ment is little consonant to the genius of our institutions ; that there is an ample choice of punishments for crimes, without adopting this ; that the electors and the appointing powers should enjoy their free choice for public stations, without legal exclusions even for crimes. are reasons of great force ; but they are reasons upon which the legislature must decide.

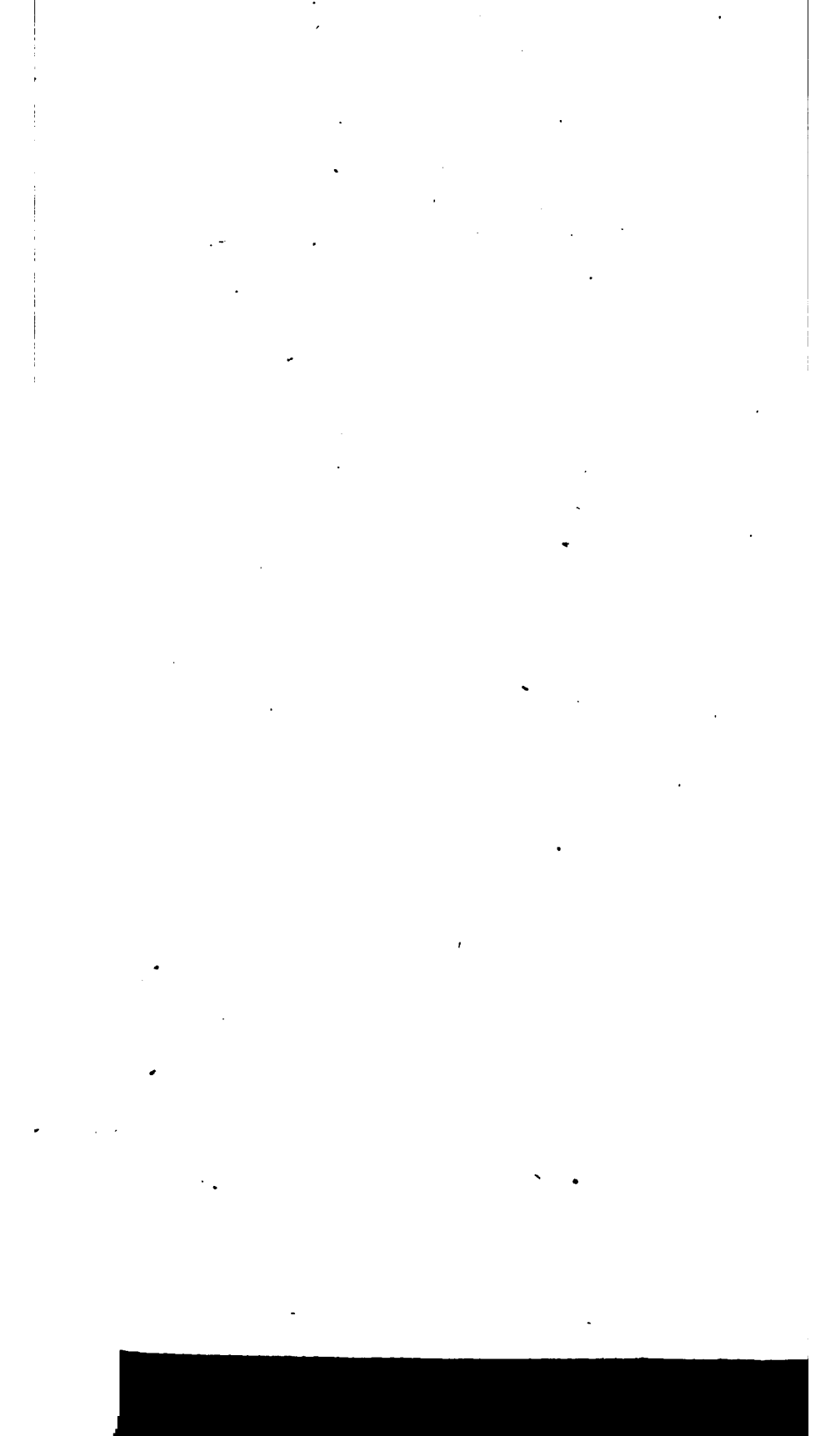
My opinion upon the whole case, is, that the punishment of incapacity to hold office, prescribed by the act to suppress duelling, is not inconsistent with the constitution ; and that this cause has been rightly determined by the courts, through which it has passed.

BOWMAN, BURT, CLARK, DUDLEY, EARLL, GARDINER, HAIGHT, LYNDE, MALLORY, M'CALL, M'INTYRE, REDFIELD, SUDAM, THORN, WARD, WOOSTER and WRIGHT, Senators, concurred.

ALBANY,
April, 1824.
Barker
v.
The People.

OGDEN, Senator, dissented.

END OF APRIL SESSION.



C A S E

OF

THE NORTH RIVER STEAM-BOAT COMPANY, Appellants,

AND

JOHN R. LIVINGSTON, Respondent,

ARGUED AND DETERMINED

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

THE CORRECTION OF ERRORS,

OF THE

STATE OF NEW-YORK,

IN FEBRUARY, 1825.

JUDGES
 OF THE
COURT FOR THE TRIAL OF IMPEACHMENTS
 AND THE
CORRECTION OF ERRORS,
 IN THE FEBRUARY SESSION, 1825.

JAMES TALLMADGE, *Lieutenant Governor, President.*
 NATHAN SANFORD, *Chancellor.*
 JOHN SAVAGE, *Ch. J.*
 JACOB SUTHERLAND, } *Justices of the Supreme Court.*
 JOHN WOODWORTH, }

SENATORS.

FIRST DISTRICT.

JOHN LEFFERTS,	DAVID GARDINER,
JASPER WARD,	CADWALLADER D. COLDEN.

SECOND DISTRICT.

JAMES BURT,	WILLIAM NELSON,
STEPHEN THORN,	WELLS LAKE.

THIRD DISTRICT.

CHARLES E. DUDLEY,	JACOB HAIGHT,
JAMES MALLORY,	RICHARD McMICHAEL.

FOURTH DISTRICT.

JOHN CRAMER,	ARCHIBALD McINTYRE,
SILAS WRIGHT, JUN.	JOHN CRARY.

FIFTH DISTRICT.

PERLEY KEYES,	THOMAS GREENLY,
SHERMAN WOOSTER,	GEORGE BRAYTON.

SIXTH DISTRICT.

ISAAC OGDEN,	LATHAM A. BURROWS,
TILLY LYNDE,	STUKELEY ELLSWORTH.

SEVENTH DISTRICT.

JESSE CLARK,	JEDEDIAH MORGAN,
JONAS EARLL, JUN.	JOHN C. SPENCER.

EIGHTH DISTRICT.

HEMAN J. REDFIELD,	JOHN BOWMAN,
JAMES McCALL,	SAMUEL WILKESON.

SAMUEL A. TALCOTT, *Attorney General.*

THE NORTH RIVER STEAM BOAT COMPANY, appellants,
against

JOHN R. LIVINGSTON, respondent.

The acts of the legislature of this state, granting to *Robert R. Livingston* and *Robert Fulton* the exclusive navigation of all the waters within its jurisdiction, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the *United States*, which authorizes congress to regulate commerce, so far as those acts prohibit vessels licensed, according to the laws of the *United States*, for carrying on the coasting trade, from navigating those waters by means of fire or steam.

The terms "coasting trade," mean commercial intercourse, carried on between different districts in different states, different districts in the same state, or different places in the same district, on the sea coast, or on a navigable river.

The power to regulate commerce among the states, conferred by the federal constitution, extends to the coasting trade.

What is meant by the terms "internal commerce of the state."

The constitution of the *United States* should be so construed, as best to promote the great objects for which it was made; avoiding the two extremes of a liberal, or strict construction.

Commercial defects in the articles of confederation considered, with the objects of the federal constitution on that head.

The powers given to the general government are to be first satisfied. Some of these are exclusive—some concurrent; and when concurrent, the provisions of the general government are paramount.

For certain purposes, the general government is a single consolidated one.

In this character, congress executes its powers.

Congress have no right, under their power of regulating commerce, to interfere with the ferries of the state, except so far as they are used for carrying on the coasting trade;

Nor can they interfere with the navigation upon our canals, or island lakes or rivers;

But, under their taxing power, they may tax canal boats, or any other property.

An injunction should not be granted, in order to secure a claim to statute privileges, if the right be doubtful.

An order of the court of chancery was, as to part of the right, against the appellants, from which they appealed, and, as to another part in their favor, from which neither party appealed; *held*, that though the respondent could not question that part of the order which was for the appellants, yet he might argue against the reasons and ground upon which it was made, it appearing that if they failed, there could be no foundation for the appeal.

Feb. 1825.

Steam-Boat
Company
v.

Livingston.

So where he had relations who were interested.

But this privilege was denied to a judge, who requested to withdraw, upon the ground that he had formed and expressed an opinion.

APPEAL from the Court of Chancery. After the decision in the *Steam-Boat Company v. Livingston*, (1 *Hopkins' Ch. Rep.* 151) *June 14th*, 1824, refusing an injunction against an indirect intercourse between the cities of *New-York* and *Albany*, to be carried on by the defendant's steam-boat, the *Olive Branch*, by way of *New-Jersey*, the plaintiffs, by leave of the Court below, upon petition presented, and an order made, *June 28th*, 1824, amended their bill, so as to charge the defendant, that, though on the first passage of his boat from *New-York* to *Albany*, he caused her to stop opposite and adjoining the city of *Jersey*, in the state of *New-Jersey*, yet such stopping was collusive and fraudulent, and intended to evade the operation and effect of the laws of this state, granting an exclusive right of navigation by steam-boats, and not for any *bona fide* purpose of commercial intercourse; and that since her first trip, although she had performed upwards of 50 passages between the cities of *New-York* and *Albany*, yet she had never, in the course of any one of them, stopped at, opposite, or adjoining any port or place in the state of *New-Jersey*, but had prosecuted such passages direct from a wharf in the city of *New-York*, to a wharf in the city of *Albany*, &c. stopping always at intermediate places upon the *Hudson*; where it was probable that passengers might be procured. The amended bill then prayed an injunction against such direct intercourse; and all such indirect intercourse, by way of *New-Jersey*, unless in the prosecution of a *bona fide* voyage, or for the purpose of a *bona fide* commercial intercourse, to or with some place in *New-Jersey*, and not for the purpose of evading the laws of this state relative to steam-boats.

Order to shew cause, &c.

This amended bill, being duly verified by various affidavits, copies of the petition, order for amendment, &c. and affidavits were, pursuant to the order, served upon the

defendant on the 1st July, 1824 ; on the 6th, the motion for an injunction was argued before the Chancellor ; who, on the 9th of July, 1824, made an order, that, so far as the complainants asked an injunction, to prohibit the navigation of the steam-boat *Olive Branch* to or from another state, the motion should be denied ; and it was further ordered, that an injunction should issue, restraining the defendant from navigating the steam-boat *Olive Branch*, in the waters between the cities of *New-York* and *Troy*, when there was no voyage made by the boat to or from another state.

July 19th, 1824, the plaintiffs appealed to this Court, from so much of the order as denied an injunction, to prohibit the navigation to or from another state.

For a statement of the case in the Court below, previous to presenting the petition to amend, with the opinion of his honor the Chancellor upon it, see 1 *Hopkins' Ch. Rep.* 150, 198 to 212.

The reasons in support of that branch of the last order, to which the appeal immediately related, were thus assigned by

THE CHANCELLOR. Since the decision of the former application for an injunction, the complainants have amended their bill ; and several affidavits are also now laid before the court. From the amended bill and these affidavits, it appears, that since the voyage upon which the former application was founded, the *Olive Branch* has been constantly engaged, and is now employed in navigation between the cities of Albany and New York, without proceeding to any other state.

Upon the facts now before the court, the complainants ask an injunction, to restrain the defendant from navigating the Hudson, in any direct voyage between ports in this state, and also, from navigating circuitously, by stopping in New Jersey, unless such stopping shall be in the prosecution of a voyage or commerce intended in good faith, and not for the purpose of evading the state grant.

One object of this application, is, to prevent a circuitous navigation through another state, where the sole purpose of

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

the passage to or from another state, may be to continue the voyage to other ports in this state, and where the circuitous voyage would not take place, if a direct voyage between ports in this state, were free.

For the complainants, it is urged, that a circuitous navigation through another state, is a fraud upon their right ; that fraud vitiates every thing ; and that when it is evident, that a circuitous voyage through another state, would not take place, if a voyage confined to the state were open, such a circuitous voyage should be regarded and treated as a fraud, and should not be permitted.

That the rights of one should be so used, as not to encroach upon the rights of another ; that things which the laws do not permit to be done directly, can not be done by artifice or circuitry ; and that fraud can not prevail ; are general principles, which are clear and undisputed. But have these principles any application to this case ? The solution of this question must depend upon the true nature and extent of the different rights, which are here in question.

The right of the defendant is derived from a law of the united states ; and that of the complainants from a law of a state ; and to a great extent, these laws are in conflict with each other. Between such laws and such rights, so far as conflict exists, there can be no action like that of opposing powers ; no equal rights entitled to equal support ; and no reconciliation of adverse rights to the same thing. The law of the united states is supreme ; and the law of the state is wholly without efficacy, so far as the supreme law extends. The state law is annihilated, so far as the ground is occupied by the law of the union ; and the supreme law prevails, as if the state law had never been made. The supremacy of constitutional laws of the union, and the nullity of state laws inconsistent with such laws of the union, are principles of the constitution of the united states. Thus, this case is entirely different from any of those, in which various rights derived from one lawgiving source, may exist together, and all may claim scope for their exercise.

What then is the right which has been adjudged to belong to steam vessels licensed for the coasting trade ? It is, as

ALBANY,
Feb. 1825.

Steam-Boat
Company.

v.
Livingston.

understand the supreme court of the united states, a right of free intercourse by navigation, from state to state ; a right to navigate freely, from one state to another, in all cases. It is the same right which a licensed vessel using sails, has, to proceed from state to state. It is not merely a right to transport merchandize or passengers, or to carry on commerce in any particular manner ; but it is a right to engage in every thing which constitutes the coasting trade, and for that purpose, to navigate from state to state, whatever may be the intention of any particular voyage. This seems to me to be the meaning of the supreme court : and such being the right conferred by a law of the union, this right must have its full effect, notwithstanding any law of a state.

The complaint now made, is, that a right given by a law of the state, may be impaired or impeded in its effect, by the exercise of a right given by a law of the union. The answer to this complaint, is, that so far as the law of the union acts upon the case, the state law is extinguished ; and that such opposing rights to the same thing, can not coexist under the constitution of our country.

If a vessel may in this manner, do that circuitously, which the same vessel may not do directly, this effect is produced by the division of legislative powers between different governments, and by express laws which distinct governments have enacted. It is one of the results of that complex system of government, which has no parallel, in its peculiar structure and the distribution of its powers. If a vessel may navigate between this state and another, it is because a law of the union, has made such a voyage lawful ; and if the same vessel may not navigate between two ports of this state, it is because a law of the state, has made such a voyage unlawful. The law of the state, is, that all its waters are subject to an exclusive right of navigation ; and the law of the union, as it is expounded by the supreme court, is, that a licensed vessel may navigate the same waters in any voyage to or from another state. These laws are to a great extent, inconsistent ; but in a certain other extent, they are not incompatible. Those waters of this state, which are not navigable to or from another state, remain subject in ef-

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

fect, to the exclusive grant of this state, because from their situation, the right to navigate from state to state, can not be there exercised. In those waters of this state, which are navigable to or from another state, the law of this state no longer excludes licensed vessels navigating to or from another state. Where from the contiguity of waters of this state to other states, a voyage to or from an adjoining state may be easily made, a circuitous voyage through an adjoining state, may as a fact, be little more than a direct voyage within this state. But the two cases are still different ; and are governed by different laws, made in virtue of distinct powers of legislation. If the laws now in question operate in this manner, it is because navigation between this state and others, is subject to the legislation of the union ; while navigation wholly within the state, is subject to the legislation of the state, so far as the laws of the state may operate in subordination to those of the union. The effect of these different laws thus understood, is to open those waters of the state, which are the theatre of navigation between this state and other states, whenever such a navigation takes place, and in no other case ; and to leave the navigation of those waters in other cases, and the navigation of waters which are wholly internal, in all cases, subject to the state grant.

If the several rights which are here claimed, had emanated from one government possessing all the powers which are divided between the union and the states, the argument concerning fraud and circuitry, would be applicable to rights so arrayed against each other ; and the courts of justice might then, so enforce and protect such rights, as to reconcile them equitably, with each other. But when one right is derived from a law of the union, and an opposing right from a law of a state, all the judges of this country, are bound to ascertain the extent of the right given by the law of the union, and to give effect to that right as fully, as if the state law had not been made. The interference of a state law with a constitutional law of the union, is ascertained, not for the purpose of reconciling repugnant provisions and opposing rights, but in order to declare the state law null.

For these reasons, I am of opinion, that the doctrines concerning fraud, can have no application to this case, or to any analogous case, arising under a constitutional law of the union and a law of a state. The constitution of the united states gives the principle, which must govern all such cases. The law of the union first has its full operation ; and so much only of the state law, as is not abrogated by the effect of the supreme law, remains. This principle destroys all incongruities, and is the only legitimate test, of which such cases are susceptible. The right given by a law of the union, to navigate from state to state, can not be abridged or restricted by a state law ; and whenever a case of navigation between this state and another takes place, the state grant is extinct, as an impediment or objection to such a voyage.

In my examinations of this subject, I have endeavored to ascertain what has been adjudged by the supreme court of the united states, and to discuss those questions of the controversy, which that court has not determined. The supreme court has fully determined the question of navigation from state to state ; and in every thing concerning that question, I follow the supreme court. In respect to navigation within the state, in cases not comprehended by the decision of the supreme court, I have given my reasons for thinking, that a license for the coasting trade, does not confer any right inconsistent with the state grant. The general result from the decision of the supreme court, the former decisions of the courts of this state, and all the views which have been taken, is, that the state grant remains in force, in those cases in which the right to navigate from state to state, does not intervene ; and that where this paramount right intervenes, the law of this state is wholly void. The portion of the state grant which remains, is that fragment of the right granted, which may have effect, after the law of the union shall first have had its full operation ; and nothing more of the state grant can remain in force. The state grant is in force, only when and where, the right to navigate from state to state, is not exercised.

So far as the complainants ask an injunction to prohibit the navigation of the Olive Branch to or from another state,

ALBANY,
Feb. 1825.

Steam-Boat
Company

v.
Livingston.

the application is refused ; and an injunction to restrain the defendant from navigating that vessel, in the waters between the cities of New York and Troy, when there is no voyage to or from another state, is granted.

T. J. Oakley, for the appellants, said the decretal order, in part appealed from, consisted of two distinct branches : so far as the motion below related to an injunction against a fraudulent intercourse between *New-York* and *Troy*, by way of *New-Jersey*, it was denied ; but so far as it related to a direct intercourse between those cities, it was granted. The latter was upon the principle, that the state laws are operative, and confer upon the appellants an exclusive right to the direct navigation. In this branch of the decree, both parties have acquiesced ; neither has appealed ; and he supposed that, for all the purposes of the present discussion, it must be laid entirely out of view, with the principles upon which it was bottomed ; and that the attention of the Court would be directed, exclusively, to the ground upon which the voyage by the way of *New Jersey* was allowed. By not appealing, he supposed the respondent had conceded the validity of the state laws in respect to internal navigation ; and would not be allowed to question them here. He mentioned this, because it might be important to understand how counsel would consider it ; and he did not know how to obtain the direction of the Court upon the subject. To his mind it was clear, that, not having appealed from that part of the order which was against the respondent, gentlemen could not now oppose the reasons upon which it was founded.

J. V. Henry, for the respondent, did not wish the gentleman to remain in the dark, as to the course which the counsel for the respondent intended to pursue. With leave of the Court, they should contest the whole grounds upon which the order, in both its branches, proceeded. No concession made by counsel, or omission to appeal, could alter the constitutional ground. If the counsel for the respondent could prove that the Supreme Court of the *United States*, in *Gibbons v. Ogden*, (9 *Wheat.* 1) had made a decis-

ion embracing and definitively settling the controversy in their favor as to both branches of the order, they have a right to do so. He had contended for this in the Court below, and intended to pursue the same train of argument here. He was not precluded by the decree. The whole subject came up by the appeal made in behalf of the company; and, upon this ground, counsel had a right to consider all the arguments with which it was connected.

ALBANY,
Feb. 1825.
Steam-Boat
Company
v.
Livingston.

A. Van Vechten, (same side) would add one word to what had fallen from his associate. Gentlemen come here to get rid of an order allowing them an exclusive right to a direct intercourse, with their boat, between *New-York* and *Troy*; but giving the respondent a common right with them to ply between those cities by way of *New-Jersey*. From the latter branch of the order they appeal. Now, if we shew that they have already got more than they are entitled to, this Court will not enlarge the order in their favor. If it turns out that they have no right to either branch of the decree, upon any ground, or in other words, if all fails them, they can not retain a part. They are certainly bound to establish an exclusive right within this state, before they can set up one in *New-Jersey*. If they fail in the former, the latter goes of course. True, we cannot appeal, till the final hearing. The order is technically binding till then; but the principle of the whole order remains open. The two questions which it involves can not be separated.

Henry, briefly examined the several reported cases in relation to the steam boat controversy, concluding with that of *Gibbons v. Ogden*, in 9 *Wheat.* 1, with a view to show that the subject was completely opened by that decision, which, in his opinion, disposed of both grounds; and in order to show that the discussion was not to be limited by the maxim *stare decisis*, upon the supposition that any decision heretofore made by this Court was not completely done away by the decree of the *United States* Court.

Oakley, had barely alluded to the difficulty which the case presented, for the purpose of learning of gentlemen what

Vol. III.

the direction of the Court. He did not intend, now, and perhaps it would be unnecessary at any stage of the discussion, to follow the gentleman in a review of the authorities to which he had referred. This might be material, if the Court should consider the questions open upon both branches of the decree. He would like to understand, if the Court thought gentlemen had a right to contend that an order against them, from which they had not appealed, was erroneous. True, they may appeal from the final decree. So may the appellants ; but the time has gone by for questioning this interlocutory order, on their part. This being a Court whose jurisdiction is strictly appellate, they cannot notice any thing which does not come up in the form of an appeal. The exclusive right of the appellant within the state is conceded. It is out of the question as to this cause, and the respondent must be silent upon it. He is estopped by his own neglect ; and the only inquiry which this Court will make is, as to the ulterior right of indirect navigation.

T. A. Emmet, for the appellants, said the difference between counsel related to a simple matter of practice ; not how the question concerning the last branch of the order should be discussed, (for that would be settled when they reached it in the course of argument,) but whether it should be examined at all. This Court directs its attention to the matter appealed from. The order appealed from has a double aspect, only one of which is looked to by the appeal. This injunction is merely interlocutory process, which may be dissolved at the final hearing in the Court below. The respondent may then apply for its dissolution ; and, if refused, he may appeal. But the 15 days, to which the appeal from an interlocutory order is limited, have gone by ; and whether gentlemen can now get it up by a side wind, is the question. He had always thought that whenever a party was dissatisfied with an order or decree, if he intended to be relieved from it, he must appeal, or be concluded. If both parties are dissatisfied, both must appeal.

[TALLMADGE, President, did not understand the counsel for the respondent as claiming to disturb the order for an injunction. On the contrary, they acquiesce in this ; but they claim to maintain the proposition that no injunction whatever should be granted, by way of answer to the appeal which claims an injunction as to a particular branch of navigation. In discussing the narrower proposition, they claim to go into the broader one as material in its support.]

ALBANY,
Feb. 1825.
Steam-Boat
Company
v.
Livingston.

[WOODWORTH, J. should, for himself, at any rate, considering the nature and importance of this controversy, be inclined to hear the counsel at large, reserving the point of practice. But he did not feel any difficulty in saying that the ground of the whole order was fairly open to discussion, in the form which the matter now assumed. To be sure, the respondent's counsel had precluded themselves from a direct appeal, by their acquiescence beyond the period of limitation ; but suppose they satisfy the Court, not only that the respondent has a right to the indirect navigation by way of *New-Jersey* ; but establish the broader proposition, that they have a right in all respects equal to that of the appellants. This, to be sure, would go to the order for an injunction, which is unappealed from ; but it would also be the most powerful reason in answer to the appeal.]

[SUTHERLAND, J. said the respondent was content with the whole order ; and willing to submit to its operation, provided it could be entirely retained. The appellants are, however, dissatisfied with a part, and come here to reverse it ; and all the respondent now claims is, the right to answer, "Here was an order, one branch of which was for you, and one branch for me ; you come to reverse the latter, and claim the whole. I now put you to your whole title. I insist you have no title whatever. The whole fails ; and of course, you have no right to a part."]

[SAVAGE, Ch. J. was clear that counsel should be at liberty to go into the whole question. If they could maintain the respondent's title to a general and unqualified navigation

between *New-York* and *Troy*, this certainly included the lesser proposition, that he might navigate on the same route by way of *New-Jersey*; and would be conclusive against the appeal.]

The other members of the Court being unanimously of this opinion, the cause was then argued at large, by

Oakley, for the appellants;

Van Vechten & Henry, for the respondent; and

Emmet, in reply.

The arguments did not differ materially from those used by the same counsel, and by Mr. *Haines*. in the court below, which will be found well reported by Mr. *Hopkins*, in his first volume of *Chancery Reports*, 151 to 198, to which the reader is referred. And I omit them here, the rather, because, they are mostly noticed in the learned and eloquent opinions of Mr. Justice WOODWORTH and Chief Justice SAVAGE, who, it will be seen, with other members of the Court, differed as to the order which should be made here.

Previous to the argument,

COLDEN and SPENCER, Senators, were allowed, on their request, to withdraw from their seats in Court; the former, on the ground that he was interested, and the latter on the ground that he was related to persons having an interest, in the event of the cause.

OGDEN, Senator, in the course of the argument, said he had long since formed an opinion upon the questions under discussion, which he had freely expressed to others, and endeavored to enforce with what little power of argument he was master of. And he asked leave, for this reason, to withdraw from his seat, and take no part in the decision.

[SUTHERLAND, J. did not think Mr. *Ogden* could be excused on this ground. The question is one of law, not of fact; and a Judge having formed and expressed an opinion,

did not come within the principle which would make this a cause of challenge to a juror.]

[WOODWORTH, J. understood Mr. OGDEN not only to have formed an opinion, but to be so wedded to that opinion that he could not yield it. As a juror, upon a question of fact, he clearly would not be received; and though being a Judge, he could not be challenged for this cause; yet, he inclined to think the Court might, in their discretion, excuse him.] But

A majority of the Court overruled the request of Mr. OGDEN, and he continued in his seat,

WOODWORTH, J. The appellants are entitled to all the interest and property, which *Robert R. Livingston* and *Robert Fulton* had, to the exclusive right and privilege of navigating steam-boats on that part of the waters of the *Hudson River*, between *New-York* and *Troy*. This right has frequently been questioned in the Courts of this state. Every objection that the ingenuity of counsel could suggest, has heretofore been presented for consideration, and overruled by our highest Court of justice.

It would be a waste of time minutely to review those decisions. They must be considered as of binding authority, until a higher tribunal shall have pronounced them erroneous. On this point, there is probably no difference of opinion. Wretched, indeed, would be the state of the community, if it were otherwise. Individual rights would depend on the fluctuating opinions of different men, sitting in the same courts—what is declared to be law to-day, might not be law to-morrow. The evils growing out of such a system are too apparent to require comment. It must, however, be understood, that this doctrine is not to be carried so far as to sanction error. It will sometimes happen, that the principle upon which a cause ought to be decided, has been overlooked, or mistaken—sometimes the rule, as settled by former adjudications, has been misapplied. In these and similar cases, it is undoubtedly proper to review and correct; but it is always expected that manifest error be pointed out. If precisely the same questions have been before decided,

In
ad
me
da

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.

Livingston.

Decisions of
this state and
the *United*
States, upon
the steam-boat
laws.

The latter
should have
their full ef-
fect ;

But should
be confined to
the case under
consideration.

and the same arguments considered, they have the highest claim to conclusiveness in the Courts where they were pronounced.

That the decisions on the exclusive right of *Livingston* and *Fulton*, are of this character, is abundantly manifest. In the cause of *Livingston v. Van Ingen*, (9 *John*. 507) the several acts of the legislature granting this monopoly, are decided to be constitutional and valid. It is true, that the effect of a license under the *United States*, for carrying on the coasting trade, was not then drawn in question—the respondents had not obtained any such license ; but it was objected, that the state laws interfered with the power given to congress, “ to regulate commerce with foreign nations and among the several states, and with the Indian tribes.” It was held, that all the internal commerce of the state, by land and water, remained entirely and exclusively within the scope of the original sovereignty. In the case of *Ogden v. Gibbons*, (4 *John*. Ch. *Rep*. 150) it was decided, that these acts were constitutional, and that the license gave the vessel an American character, while the right of the individual procuring the license, to use the vessel, as against another individual, setting up a distinct and exclusive right, remained precisely as it did before. The decree was affirmed by this Court. (17 *John*. 488.) The Supreme Court of the *United States* reversed that decree, and it is contended, that the reversal was upon the grounds litigated in the cause now before us. If this be so, it becomes our duty to give that decision its full effect, as proceeding from a Court of paramount and controlling jurisdiction.

Before I proceed to discuss this point, it is proper to observe, that the extent of the decision in the case of *Gibbons v. Ogden*, is to be limited, as it was in *Sturges v. Crowninshield*, (4 *Wheat*. 122.) The Court there say, that *their opinion is confined to the case actually under consideration*. In the case of *Mather v. Bush*, (16 *John*. 248) the Supreme Court of this state proceeded on that ground, and held, that between that case, and *Sturges v. Crowninshield*, there was a material and manifest distinction ; that a full and fair effect to the decision in *Sturges v. Crowninshield*, ought to be given, so far, and so far

only, as that Court had actually decided ; that it would be unfit and irregular, to analyse the reasoning and illustrations in the opinion delivered, any farther than to show, that the point then presented was not intended to be decided ; and that we were not called upon to take a step in advance of the Supreme Court of the *United States*. To the opinion delivered in *Mather v. Bush*, I fully assented, both as to the result and the reasons assigned. On further reflection, I see no cause to recede from the ground then taken. I proceed to inquire—

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

First, What was the precise point in issue, in the case of *Points Gibbons v. Ogden*, and what was decided ?

Secondly, Does the case before us present the same question ?

Thirdly, If the respondent has the right to navigate his steam-boat from *New-Jersey* to *New-York*, under a license to carry on the coasting trade, is he in the fair exercise of that right, by proceeding from *New-York* to *New-Jersey*, and from thence to *Albany*, unless the voyage shall be for the purpose of carrying on such trade *bona fide*, and not for the purpose of evading the state grant ?

The bill of *Ogden* alleged, that by virtue of his exclusive right, he run a steam-boat, called the *Atalanta*, between the city of *New-York* and *Elizabethtown Point* ; that the defendant, *Gibbons*, was the owner of two boats impelled by steam, and in contravention of the exclusive right of the plaintiff, had set in motion the said boats, and employed them in the transportation of passengers, between the city of *New-York* and *Elizabethtown* ; and that they then actually navigated between those places. An injunction was granted, restraining the defendant from navigating his boats on the waters of this state, between *Elizabethtown* and *New-York*. The answer admitted, that the boats were intended to navigate between *New-York* and *Halsted's Point*, in *New-Jersey* ; and that they did run, and continue so to do, until restrained by the injunction. The defendant averred, that his boats were duly enrolled, and licensed under the laws of the *United States*, to be employed in carrying on the coasting trade ; and insisted, that under the license, they might lawfully be employed in

What was the
issue in *Gib-
bons v. Ogden*,
(9 *Wheat.* 1.)

Feb. 1825.

Steam-Boat
Company

Livingston.

ferent states, and could not be excluded or restrained therein, by any law or grant of a particular state, on any pretence to an exclusive right to navigate the waters of any particular state by steam-boats. The residue of the answer presents a distinct ground of defence, not connected with the present inquiry.

Not the right
to navigate be-
tween two
points in this
state.

An answer
does not put in
issue any thing
not applicable
to the bill, tho'
it be more ex-
tensive than
the bill.

The preceding is a concise statement of the pleadings, on which the Supreme Court of the *United States* adjudicated. What, then, was in issue between these parties? Certainly not whether the license conferred a right to navigate between two points in this state, when the voyage is not a continuation of a passage to or from another state. The reasons in support of this proposition appear to me conclusive. *Ogden* claimed no right to a navigation of that description. He merely claimed the right to run his boat from *Elizabethtown* to *New-York*. His purchase extended no farther. The bill complained of the invasion of this right solely. If the answer sets up a right more extensive than that asserted in the bill, it puts in issue only so much as applies to the case made by the bill. What goes beyond, may or may not be well-founded. Let it be either, it seems necessarily to follow, that the plaintiff is not called on to admit or deny it. As to him, it may be considered as irrelevant matter, unless the whole case made by the answer depends on one and the same principle. The answer alleges a right, under the license, to navigate steam-boats from *New-York* to *Elizabethtown*. This meets the case made by the bill. If it also claims a right, under the license, to navigate from *New-York* to *Albany*, without reference to the commencement or termination of the voyage in *New-Jersey*, in this respect it goes beyond the bill, and is not matter in issue between the parties, unless the decision of the first necessarily decides the second. If the two questions are not precisely the same; if there are well-founded doubts whether the establishment of the right to navigate between *New-York* and *New-Jersey*, proves the right to navigate the whole extent of the *Hudson*; and more especially, if there are substantial grounds of argument to resist the right claimed, in the latter case, which do

not apply to the other, it can not safely be said, that a decision on one controls the other. It requires a clear and explicit adjudication of the higher tribunal, on the point, before the respondent is entitled to rest on the ground of authority.

I have supposed that *Gibbons* claimed, in his answer, the right set up by the respondent. I think it manifest, however, that he did not. A right to employ his boat in the coasting trade, between different states, is all that seems to be claimed. If this protected the defendant, in running his boats from *Jersey* to the city of *New-York*, against the exclusive privilege of the plaintiff, it was all the defendant desired, and all that necessarily came in question. The boats were employed in that navigation only, and for that purpose the answer alleges they were intended. To that extent the decision of the Supreme Court of the *United States* is definite and certain. The defendant run no boat under the circumstances presented in the case before us. It was, therefore, a mere speculative question, whether the exclusive privilege must yield to the license, in such a case. I admit it was incidental to, and in some degree, but not inseparably, connected with the right to run boats from *Elizabeth-town* to *New-York*. Unless, therefore, the Supreme Court of the *United States*, in language not to be mistaken, have considered the two cases to be the same, or that the license would equally extend to authorize a navigation between two places within the state, I am not disposed to anticipate, or go in advance of their opinion. Resort, then, must be had, in the first place, to the decree itself, and then to the reasoning upon which it is founded.

The language of the decree is, that the license to carry on the coasting trade, gave full authority to navigate the waters of the *United States*, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of *New-York* to the contrary notwithstanding. This was the point decided, and nothing more. It was all the appellant required, to obtain a reversal. Chief Justice *Marshall* observes, "the coasting trade is a term well understood; the law has defined it, and all know its meaning perfectly; the

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston

The question of exclusive right to navigate directly between two points within the state, was merely speculative in *Gibbons v. Ogden*; incidental, but not inseparably so, to the main question.

The decree, in that case, must be limited to the coasting trade.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

act describes, with great minuteness, the various operations of a vessel engaged in it; and it can not be doubted, that a voyage from *New-Jersey* to *New-York*, is one of those operations." This, then, is the basis upon which the decree rests. It is a particular specification of the point decided by the Court. The remaining parts of the decree, where general terms are employed, must be understood as conforming to that specification. It is analogous to the principle which governs in the construction of other instruments. Where there is a particular recital, or enumeration of particulars, to which the instrument is to apply, subsequent general words shall be qualified by the particular recital. When, therefore, the Court afterwards declare, "that so much of the several laws of the state of *New-York*, as prohibits vessels licensed according to the laws of the *United States*, from navigating the waters of the state of *New-York*, by means of fire or steam, is repugnant to the constitution, and void," does it authorize a navigation for carrying on a trade wholly internal, within the waters of a state? Evidently not, unless the coasting trade is declared to extend, not only to commerce between the states, but also to internal commerce within the state. When, therefore, the decree speaks of navigating the waters of the state by fire or steam, the words, "*for the purpose of carrying on the coasting trade*," are necessarily understood. So, also, in the last clause, where the Court say, that the "decree of this Court, which perpetually enjoins *Gibbons* from navigating the waters of this state, by steam or fire, is erroneous," must receive the same construction; so that the whole decree may hold an uniform language, and correctly state the precise point involved in the decision.

Unsafe to look
beyond the
point actually
decided;

But it is contended, that the opinion delivered embraces the present case, and sanctions the right claimed by the respondent. I have already suggested my views, as to the reasoning and illustrations which Courts may assign in support of their judgments, and that, generally speaking, we tread on unsafe ground, if we depart from the point actually decided.

In discussing the general nature of the power to regulate commerce among the states, and the effect of a license to

carry on the coasting trade, the right of the state over its internal commerce was considered. But it is no where asserted, in the opinion delivered, that the license to carry on the coasting trade, extends to the commerce of a state purely internal. If, from the reasoning, we may conjecture, or even think it probable, that the superior tribunal may, on a future occasion, carry the doctrine to that extent, we are not justified in reversing what has been solemnly and repeatedly adjudged in our own Courts on such grounds. It must either be on the ground of an express decision by paramount authority, or that, on a consideration of the new points of view, in which the question is presented, we are satisfied the former decisions are erroneous.

The Chief Justice considers the power of regulating commerce, as extending to the regulation of navigation, and that commerce "among the several states," comprehends every species of commercial intercourse; that it can not stop at the external boundary line of each state, but may be introduced into the interior. But it was "not intended to say, that these words comprehend commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to, or affect other states." And, again, he observes, "the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration pre-supposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be *the exclusively internal commerce of a state*. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the state generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

and reverse the decision of this court, because the S. C. of the U. S. would, from their language, probably do this, on the question coming before them.

Their language considered.

Extent of the power to regulate commerce among the states.

ALBANY,
Feb. 1825.

Steam Boat
Company

v.
Livingston.

It does not
include inter-
nal commerce.

Commerce
Supreme Co
nal comme
another.
may be co

the inter
Elizabeth
the vess
ion deli
betwe
side of
two s
in or
thir
cor
ca
pe
a
i

W
tern
voy
bo
str
ig
st
d

within a state, is not within the direct power given to congress, but is under state control, except in certain cases, which I will directly point out. In pursuing this subject, it must be kept in mind, that I am not examining this as an original question, but to ascertain what ground is covered by the decision of the Supreme Court : to that extent it will receive our sanction.

The opinion clearly maintains, that although the states have the power of legislating on the subject of their internal commerce, and no *direct power* is given to congress on this subject : yet that a collision may sometimes take place, and consequently that the law of congress, if within their delegated powers, being the supreme law of the land, must prevail. This collision did exist in the case of *Ogden v. Gibbons* ; for although it be admitted that the state has a right to regulate its internal commerce, the power is subject to this qualification, that whenever that regulation interferes with the power of congress, so far as it interferes, it is inoperative and void. The Supreme Court considered the steam boat monopoly as the exercise of a right strictly commercial, and that therefore it must yield to a paramount law of congress, made in pursuance of the constitution. By the license under that law, *Gibbons* was authorized to navigate from *New-Jersey* to any port or place in this state. To that extent the state law is in collision, and to that only has the decree reference in the following sentence : "that so much of the several laws of the state of *New York* as prohibits vessels licensed, according to the laws of the *United States*, from navigating the waters of the state of *New-York* by means of fire or steam, is repugnant to the constitution and void." It was argued that a construction put on the words, "commerce among the states," like that which obtained the sanction of the Supreme Court, would subvert state inspection laws, health laws, turnpike roads and ferries. But it was answered, as to these, that although having a considerable influence on commerce, the right to pass them was not derived from the power to regulate it, but formed a portion of that mass of legislation within a state, not surrendered to the general government. Certain it is, that according to the ex-

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

Yet a collision
between a U.
S. & state law
may sometimes
exist, when
the state law
must yield.

Inspection
laws, health
laws, turnpike
roads and fer-
ries remain
subject to state
legislation.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.

Livingston.

Gibbons could not set up a ferry between the cities of *Jersey* and *New-York*.

If congress have an incidental or concurrent power over the internal commerce of the state, they have not exercised it.

planation given by the Court, of the terms "commerce among the states," they can not be defended as commercial regulations. It is because they are not so considered, that they are not affected by a law of congress. On this ground *Gibbons* could not set up a ferry between the city of *Jersey* and *New York*: it would not be a commerce within the meaning of the constitution, and consequently the state grant of the ferry would be valid. These points I consider as decided, and do not feel myself at liberty to question them.

The opinion delivered, supposes that the subjects of internal state regulation may be also affected in another way by the general government. The proposition is thus laid down: "If the legislative power of the union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power expressly given." (9 *Wheaton*, 203, 204.) It is here proper to remark, that the act of congress for licensing vessels to be employed in the coasting trade, must be considered as an act passed in the exercise of their express powers; it is to give effect to those powers exclusively. It does not profess to call in aid of the express power; any incidental power, nor can it be collected from the act, whether congress claim the right of interfering with the purely internal commerce of the state, in consequence of any incidental power. Admitting that congress may, on this principle, support the right to pass laws, in collision with the internal regulations of a state, the only consequence is, that so far, and to that extent, the general and state governments have concurrent powers; and no question can arise upon them, until they come in conflict. There is nothing, then, in the principle which bears upon the present question; for congress have not yet attempted to exercise any incidental power, at variance with the state right to regulate its internal commerce.

Opinion of
C. J. Marshall
seems to admit
that if the
power exist, it
is an incidental,
not a direct
power in congress.

The example given by the Chief Justice, as to the manner in which the incidental power may be exercised, as I understand it, has an important bearing upon the principal question, what is commerce among the states? He says, page 204, "If congress license vessels to sail from one port

to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police." The case put, seems to be the very case under consideration, "a vessel sailing from one port to another in the same state." This is an implied admission, that it does not fall within the express power of congress to regulate commerce among the states, and could only be reached, if reached at all, by the exercise of what is called a power incidental to the power expressly given.

According to the view I have taken, the question to be decided is narrowed down to a single proposition: Does the direct power of congress to regulate commerce among the states, include the right of regulating commerce between two points in the same state, when there is no voyage to or from another state? I have endeavored to show that it does not; and that if there is an incidental power, which, when called into action, might bear on internal state legislation, the answer is, it is not exclusive, and no such power has yet been exercised: when it is, it will be time enough to consider its validity.

It does not seem to me that the law of congress, or the license granted under that law, can make any difference, according to the view taken by the Supreme Court; for it necessarily results, that if congress have the exclusive power to regulate commerce among the states, (and so it is held,) the states have no power at all to legislate on the subject. Their acts must be void, whether congress had passed any law regulating the coasting trade or not. The right, it is true, to carry on the coasting trade, is held to be derived from the license; but if it were not so, the same consequences would result as respects the appellants. Their claim for an injunction would then rest on a law, inoperative and void, so far as it comes in collision with the constitutional power of congress. It could not be supported, whether the license gave a right to the respondent, or was only evidence of the character of the vessel. The whole question depends

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

The question here is narrowed to the single proposition, whether congress have a direct power to regulate commerce, simply between two points in the same state.

The right to regulate commerce among the states is exclusive in congress, and can not be touched by a state, whether congress have acted or not. The license can make no difference; and in this view, the question is, what is meant by "commerce among the states?"

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

on this : what is meant by the expression, "commerce among the states?"

But the act of congress, and the license under it, may, I apprehend, be advantageously considered, for the purpose of fortifying the construction given to the powers of congress on this subject.

But the act of congress and license are material as fortifying the construction of the powers of congress.

The act is a plenary exercise of their power as to commerce by water.

The terms, "coasting trade" do not apply to commerce confined to the internal waters of a state.

I consider the act regulating the coasting trade, as a plenary exercise of the powers of congress under the constitution, so far as navigation, or a commerce by water, is concerned. The act has given no definition as to the extent of this right. The sense of congress seems to be, that the "coasting trade" is coextensive with the direct power "to regulate commerce among the states." It does not assert any other or greater right. Does, then, the coasting trade, within its legitimate meaning, apply to a commerce carried on by a citizen of a state, exclusively on the internal waters of the same state?

When words are employed, which had previously received a known interpretation, they are to be construed in that manner, unless a different intent is plainly indicated. When the constitution of the *United States* was adopted, it found the states in the possession and exercise of a coasting trade; each state had a right of prescribing its own regulations; the citizens of one state, when navigating the waters of another state, were obliged to conform to its regulations. Subject to these, they might navigate from one state to another, and to any port or place within a state. This was the coasting trade as generally understood. A voyage proceeding from another state to this state, would be the coasting trade, whether the vessel terminated her voyage at the city of *New-York*, or proceeded on her voyage to *Albany*. It would, within the meaning of the terms, be a coasting trade, although the internal waters of the state form no part of the coast. The trade had reference to an intercourse between states, which might be carried into the interior of a state, if there were navigable waters: but with respect to a trade purely internal, between different parts of the same state, I am not aware that it was ever considered within the meaning.

of those terms. It would have been novel, I apprehend, if not unintelligible language, to speak of the coasting trade on the *Hudson River*. It seems therefore to my mind a fair inference, that congress never contemplated that the license gave a right to navigate the internal waters of a state, unless in the prosecution of a coasting trade from state to state; but intended to limit it to a commerce of the latter description.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

The grievance in this case is, that the respondent navigates a steam boat from *New-York* to *Albany*, notwithstanding the exclusive right of the appellants. The injunction does not, according to the view I have taken, interfere or come in collision with the license.

Injunction
does not interfere with the
license.

But it is contended that *this* is a coasting trade from state to state, inasmuch as the boat of the respondent on her voyage from *New-York*, stops in *New Jersey*, and from thence proceeds to *Albany*. The appellants allege that it is collusive and fraudulent, intended to evade the operation of the laws of this state, and not for any *bona fide* purpose of commercial intercourse. In confirmation of this, they charge that the respondent's steam-boat stopped adjoining the city of *Jersey*, but did not land or take on board any goods, wares, merchandize, or passengers whatever. On this state of facts, the question recurs, what is authorized by the license? It is a coasting trade from one state to any other port or place in another state. The law of the state excluding the entry of such vessels is in collision; but the collision exists only, when the trade is carried on. The meaning of the license is, that you may enter the waters of *New-York* for the purpose of trade; a state law can not prevent your entry. If for other purposes, the license can not be called to your aid. I think this evident from the following considerations:

Whether a
collusive stop-
ping at *New-
Jersey* varied
the case.

It is commerce only among the states that congress is authorized by the constitution to regulate. The license can not have a more extensive operation than the power from which it is derived; consequently it can only act upon commerce. The commerce specified is the coasting trade, and to that it is confined. To say that a vessel proceeding from *New-York* to the wharf in the city of *Jersey*, without any

Feb 1825

Steam-Boat
Company
v
Livingston.

What can not
lawfully be
done directly,
cannot be done
indirectly.

board goods or passengers, is a trade within the meaning of the license, is to my mind a gratuitous assertion ; but when to this is added, that the touching at *New-Jersey* seems to have been for the purpose of fraudulently evading the laws of this state, and not for any *bona fide* purpose of commercial intercourse ; when it is evident, that the inducement was to bring the respondent within the decision in the case of *Ogden v. Gibbons*, some of the land marks of the law must be removed, before the doctrine can be sanctioned. No principle is better settled than this: what cannot lawfully be done directly can not be done indirectly. This circuitous voyage was in evasion of the laws of this state ; the touching at *New-Jersey* was colourable only. *The affidavit of the respondent has not denied that it was an evasion.* Indeed, the whole scope of the respondent's argument has been directed to shew that the Chancellor's opinion is incorrect, in considering a voyage commencing and terminating in this state as not protected by the license ; while that part which relates to touching at a port in another state, in the course of the voyage, has scarcely been urged. It may be laid down as a general principle, that whenever an act is done *in fraudem legis*, it can not be the basis of a suit, in the Courts of the country, whose laws are attempted to be infringed. (*Jackson v. Jackson*, 1 *John*. 435.) The fraudulent act is considered as no act ; it is the same as if nothing had been done ; and although I do not think it necessary to lay any stress on the intention with which the act was done, because the facts do not constitute a *coasting trade*, yet I think the principle applicable, both as it respects the act of congress and the laws of this state. The attempt is to convert into a *bona fide* coasting trade, what is so in point of form, and colorable only ; and to make it the basis on which to resist successfully the laws of this state. Neither can succeed. The respondent must abide the decision of the Court on the other grounds.

Decree of
the chancellor
should be re-
versed ; and in-
junction go a-
gainst an indi-

My opinion is, that the decree of his honor the Chancellor be reversed, and that an injunction issue restraining the respondent from navigating the steam-boat *Olive Branch* in the waters between the city of *New-York* and *Troy*, when

there is no voyage made to or from another state in good faith, for the purpose of carrying on the coasting trade, when no such *bona fide* trade or commerce shall be actually carried on.

SUTHERLAND, J. and CRARY, HAIGHT, LAKE, MCCHAE, NELSON, THORN and WILKESON, Senators, concurred.

SAVAGE, Ch. J. The appellants filed their bill in the Court of Chancery, charging the respondent with a violation of their exclusive right to navigate the internal waters of this state, by navigating on those waters, from *New-York* to *Trenton*, with his steam-boat, the *Olive Branch*, for the purpose of carrying passengers. They prayed an injunction to restrain and prevent such navigation.

The opposition to the motion for an injunction, rested on a copy of the enrolment of the steam-boat *Olive Branch* and a license for the coasting trade, and also the affidavit of the defendant, relying upon an intercourse with the state of *New-Jersey*. The plaintiffs allege, that the intercourse with the state of *New-Jersey* was collusive and fraudulent, and not a *bona fide* voyage to or from another state.

The Chancellor granted the injunction to restrain the defendant from navigating directly from *New-York* to *Trenton*, when there is no voyage made by the steam-boat to or from another state; but denied the injunction to prohibit navigation to or from another state. The latter part of the decree, only, is appealed from.

The respondent denies any title in the appellants, to the exclusive right of navigation with steam-boats, in the waters of this state; and contends, that unless their right be first established, the question of fraud or no fraud is altogether immaterial. Under this view of the rights of the respondent, the whole question has been argued by counsel before this Court. I proceed, therefore, to enquire, whether the appellants have any right to the exclusive navigation of the waters of this state, with vessels propelled by steam; and particularly, whether they have such right in the waters of the *Hudson River*.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.

Livingston.

The appellants have all the right which was granted in *Livingston and Fulton*. The validity of that grant is denied. It has been asserted by the Courts of this state; and denied by the Supreme Court of the *United States*. The point of enquiry, then, will be, whether any part of the grant is still valid; and, if any, whether it exists as to the waters of the *Hudson River*.

Upon the argument of this cause, the counsel agreed in urging upon the Court the propriety of adhering to former decisions, not overruled, upon the ground that a Court of dernier resort can not review its own decisions, and that its adjudications must remain the law, until altered by legislative authority. It will be useful, therefore, before entering into any discussion as to the constitutionality of the laws in question, to ascertain precisely what has been judicially determined, both by this Court and by the Supreme Court of the *United States*; that while we adhere with firmness to decisions of this Court, deliberately made, we may recede, with respectful submission, from so much as has been overruled by the superior tribunal.

The decisions
upon the
steam boat
question con-
sidered.

The constitutionality of the laws relative to steam-boats, was first drawn in question in the case of *Livingston & Fulton v. Van Ingen & others*, (9 John. 507.) In that case, the title of the plaintiffs was substantially like that of the appellants here. The defendants were charged with violating the plaintiffs' exclusive right, by navigating with steam-boats between *New-York* and *Albany*. The defence in that case differed from this, inasmuch as *no coasting license was shown*. The defence rested on the ground that, by the adoption of the constitution of the *United States*, the state had parted with all right to legislate on the subject, and that, therefore, the acts were unconstitutional and void. This defence was unanimously overruled by the Court, on the broad ground of the constitutionality of the laws; but as no decision can be considered absolute authority, except upon a state of facts similar to those adjudicated upon, the case of *Livingston v. Van Ingen* is an authority so far as the facts are similar; but when they differ, it is no farther authority than the reasoning of

Decisions not
absolute au-
thority, except
upon a similar
state of facts.

the Judges is applicable, and then only as the opinion of learned men on the question.

In the case of *Gibbons v. Ogden*, (17 John. 488) (1824) the complainant, in the Court of Chancery, charged the defendant, *Gibbons*, with an infringement of the exclusive grant to *Livingston* and *Fulton*, which he, *Ogden*, held by an assignment, by his (*Gibbons*?) navigating with his boats, the *Stoudinger* and the *Bellona*, between *New York* and *Elizabethtown Point*. The defendant justified, on the ground that his boats were above 20 tons burthen, and had been duly enrolled and licensed under an act of Congress, and he insisted, that under such licenses his boats might lawfully be employed and navigated in the coasting trade between ports of the same state, or of different states, and could not be excluded or restricted by any act or grant of any particular state. This defence was overruled by the late Chancellor, who did not consider the license as conferring any right whatever. He held, that the license only gave the vessel an American character, but left the owner of the vessel precisely as he was before the license, in respect to the exclusive right claimed by *Livingston* and *Fulton*, and their assigns. The cause was brought into this Court, by appeal from the decretal order of the Chancellor, Mr. Justice *Platt*, who delivered the unanimous opinion of the Court, agreeing with the Chancellor in the opinion, that the only effect of the license is to determine the national character of the vessel, and the rate of duties which she is to pay; and he adds, that "a vessel, coasting from one state to another, would have exactly the same right to trade, and the same right of navigation, whether she had the coasting license or not;" and the opinion of the Chancellor was affirmed, on the ground that the question had been settled in the cause of *Livingston v. Ingen*. The decree of the Chancellor, which was affirmed in this Court, declares the several acts of the legislature of the state of *New-York*, granting the exclusive right to be valid, notwithstanding the objections taken by the defendant; "and that the complainant is well entitled to the right exclusively to navigate the waters for the purposes mentioned in the said bill of complaint, with boats moored

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

In the S. C. of
the U. States.

steam or fire ; and that the defendant can not lawfully navigate the same, with the steam-boats of him the said defendant, &c. under the respective enrolments and licenses, &c."

When this decree, and the whole proceedings, were carried into the Supreme Court of the *United States*, that Court was of opinion, that the several licenses to the steam-boats, the *Stoudinger* and the *Bellona*, to carry on the coasting trade, &c. "give full authority to those vessels to navigate the waters of the *United States*, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of *New-York* to the contrary notwithstanding ; and that so much of the several laws of the state of *New-York*, as prohibits vessels licensed according to the laws of the *United States*, from navigating the waters of the state of *New-York*, by means of fire or steam, is repugnant to the said constitution, and void." The decree was, therefore, reversed.

The question as to an exclusive right in the waters of this state has not been directly decided ;

The facts in the two cases cited, were not similar to each other, nor to this case. In the first, that of *Livingston v. Van Ingen*, the controversy was as to the validity of the state grant, within the bounds of the state ; but the effect of a license, under the act regulating the coasting trade, could not be considered, because it was not a fact in the case. In the second case, that of *Ogden v. Gibbons*, the effect of a coasting license was considered, both by the Court of Chancery and by this Court, and the license was adjudged to give no right whatever. In this opinion both Courts erred, as is proved by the decision of the Supreme Court of the *United States* ; by which it is settled, that a steam-boat navigating with a coasting license, performing a voyage from a port of another state to a port in this state, is authorized to navigate the waters of this state, the laws of this state to the contrary notwithstanding.

Though it has been virtually decided in *Gibbons v. Ogden* ; both by this court and the S. C. of the *United States*.

But though, whether a steam-boat may, under the authority of a license, navigate the waters of the *Hudson* within this state, in opposition to the grant to *Livingston* and *Fulton*, is a question which has not been decided, in terms, by this Court, or the Supreme Court of the *United States* ; yet it seems to me to have been virtually decided by both

Courts. In this Court, the only effect of the license was declared to be that of giving an American character, and that it conferred no right in a case of intercourse between this state and the state of *New-Jersey*. Of course, it could have no effect where the intercourse was entirely within the state. In the Supreme Court of the *United States*, the language of the decree is, that "the several licenses to carry on the coasting trade, give full authority to those vessels to navigate the waters of the *United States*, by steam or otherwise, for the purpose of carrying on the coasting trade." I agree, that the decision of the Court is to be considered in reference to the facts of the case, and that the facts in that case were different from this, inasmuch as there the voyage was from a port in another state. Certain points, however, were decided, which were, in a degree, necessary to the main decision given in the cause.

ALBANY,
Feb. 1825.
Steam-Boat
Company
v.
Livingston.

Some of the points decided by the Supreme Court are,

Points decided
by the latter.

1. That the power to regulate commerce among the states is exclusive.

2. That commerce means not only traffic, or the exchange of commodities, but also intercourse ; that it includes navigation.

3. Congress has power, of course, to regulate navigation. This regulation of commerce and navigation must take place *within* the states : the waters of the *United States* are necessarily the waters of some particular state : congress must act on the subject where it exists.

4. That though the right of intercourse does not depend on the constitution and laws of congress, yet congress has power to regulate that right, and has done so, by " an act for enrolling and licensing ships or vessels to be employed in the coasting trade, and fisheries, and for regulating the same," passed 18th February, 1793.

5. That this act implies, unequivocally, an authority to licensed vessels to carry on the coasting trade : the license is the language of the legislature, and transfers to the grantee all the right which the grantor can transfer.

6. That what is meant by the coasting trade is defined in the act of 1793.

Feb. 1825.

Steam-Boat
Company

v.
Livingston.

the same manner as vessels propelled by wind, and are entitled to the same privileges.

It is also intimated, and an opinion expressed, though not judicially decided, that the transportation of passengers is equally a branch of the coasting trade, as the transportation of goods; that congress has power to license vessels to sail from one port to another in the same state; and that this power implies no claim of a direct power to regulate the purely internal commerce of a state, or act directly on its system of police.

From these premises it seems to me to follow, as a corollary, that vessels with a coasting license, are authorized to navigate, for the purpose of carrying on the coasting trade in all the navigable waters of the state in which the coasting trade can exist.

If I am correct in these inferences, they lead necessarily to the decision of this cause, and then the objection, that we ought not to go in advance of the Supreme Court, is altogether inapplicable. Before proceeding to apply these principles, it is proper to settle the meaning of certain words and phrases used in this controversy. What, then, do we understand by commerce among the states? In what does the coasting trade consist? And what is internal commerce? Do they interfere with each other, or where is the boundary that marks the limit of each?

What is
meant by
"commerce among
the states," as used
in the constitution
of the
United States.

It has been contended that commerce among the states, means a voyage from state to state, commencing in a particular state and terminating, as respects the authority of the license, at the boundary line of the state entered; and that the subsequent progress of the vessel is under state regulations. If this were correct, then the vessel making a voyage from a port in one state to a port in another, must navigate subject to the regulations of the state in which she commences her voyage, until she touches the boundary line of such state; and at the same moment when she leaves the jurisdiction of the one state, she enters the jurisdiction of the other, and then navigates subject to the regulations of the state she has thus entered, until she completes her

voyage. Hence she is under the control of state regulations during her whole voyage, except perhaps at the moment of passing the boundary line. By this construction, congress is ousted of its jurisdiction altogether; and that clause of the constitution which gives them power to regulate commerce among the states, becomes a dead letter. The Supreme Court says, "commerce among the states can not stop at the boundary line of each state, but may be introduced into the interior." Again: "commerce among the states must, of necessity, be commerce within the states." In the same opinion, we find as full a definition of the term as the facts of the case required, and beyond that it was not necessary to go. Accordingly, it is said, "comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." Again: "the genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are *completely* within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The *completely* internal commerce of a state, then, may be considered as reserved for the state itself."

It is evident from these expressions, that the Supreme Court was of opinion, that over a part of the internal commerce of the states, congress has power. Precisely how far that power extends, it did not become necessary to decide; but from the expressions, *completely internal*, *exclusively internal*, and *purely internal*, it is clearly inferrible, that all that part of the internal commerce of a state which is not *exclusively internal*, is subject to the regulation of congress. How far, then, within the state, does that commerce extend, which is not *completely* internal? If all commerce, which enters the exterior lines of a state, is internal, and exclusively so, then all commerce would be included, as well foreign as among the states, which is directly contrary to the decision, and to the constitution. The counsel for the appellants

Feb. 1825.

Steam-Boat
Company
v.

Livingston.

contended, if a steam vessel from another state, with a coasting license, has a right to enter a port in this state, that, at the exterior port, the voyage is terminated as between the states, and that she can not proceed to any other place within the state, except in subjection to the exclusive grant. His honour the Chancellor decides, that such a vessel may proceed to any port in this state, and depart from any port in this state and proceed to another, and touch at intermediate places ; and that the navigation which is subject to the state grant is that which takes place between any two points in this state, when the voyage is not a continuation of a passage to or from another state. The Supreme Court says, " if congress license vessels to sail from one port to another, in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

The power of congress to license vessels to sail from one port to another in the same state, is here distinctly asserted, as incidental to the power directly granted. It seems, also, to be, impliedly at least, admitted, that this is a regulation of commerce within a state, and subject to state legislation. It is elsewhere asserted, that the power to regulate commerce with foreign nations, and among the states, is necessarily an exclusive power. From what is here said, it seems that the incidental power to regulate commerce within the state, is a concurrent power ; and if so, it is admitted, that in case of collision, the law of congress must prevail. But the opinion here seems to consider the purely internal commerce as not affected by the act of licensing vessels to sail from port to port within the state. If this be so, then the internal commerce over which the state has exclusive control, is something existing where coasting vessels can not come, or have no right to navigate, as in the case of a ferry within the state. And hence it follows, that the commerce among the states, which congress has power to regulate, either directly or incidentally, is that commerce which may be carried on

It is that which may be carried on in vessels regularly licensed by congress ; or, in other words, the coasting trade.

by vessels regularly licensed by the laws of congress ; or, in other words, the coasting trade.

This brings me to the enquiry, what is the coasting trade ? The answer to this enquiry is to be found in the laws of congress, the first of which is entitled, " an act for registering and clearing vessels, regulating the coasting trade, and for other purposes," passed *September 1, 1789* ; but more particularly in " an act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed *February 18, 1793*. It can not be necessary to enter into a minute analysis of the sections of this last mentioned act ; a general reference to some of its provisions being sufficient for my present purpose.

This act contains, in the first section, a prohibition to all vessels, except those authorized as is therein provided, from carrying on the coasting trade. The license then gives the authority, or the act regulates a right previously existing, (and it is, in my judgment, immaterial which, for the purpose of deciding this controversy) and particularly specifies the mode of carrying on trade in certain vessels, on the coast or a navigable river, between districts in different states, and districts in the same state, and *different places in the same district*. This, then, is the definition given by congress to the term, " the coasting trade." Chief Justice *Marshall* so understands it, when he says, " The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it."

According to the definition of the coasting trade, as extracted from the act of congress, of *February 18, 1793*, it means commercial intercourse carried on between different districts in different states, *between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river*. Agreeably to this definition, a voyage in a vessel of suitable tonnage, from *New-York to Albany*, is as much a coasting voyage, as from *Boston to Plymouth* or *New-Bedford*. In both, the termini are in the same state, and within the navigable waters of the

ALBANY,
Feb. 1825.

Steam-Boat
Company

Livingston.

What is meant by " the coasting trade," will appear from the several laws of congress on the subject.

Acts of *Sept. 1, 1789*, and *Feb. 18, 1793*.

The coasting trade is commercial intercourse, carried on between different districts in different states, different districts in the same state, and different places in the same district, on the sea coast, or on a navigable river.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.

Livingston.

United States, though in one the navigation is upon a river; in the other on the ocean. The government of the *United States* have no jurisdiction, (the *District of Columbia* and the territories excepted) where a state has not also jurisdiction for state purposes; and I can see nothing in the nature of our governments, which excludes the authority of congress from our navigable rivers. They are arms of the sea. As well might *Louisiana* shut the mouth of the *Mississippi*, or *Virginia* the *Chesapeake*, as *New York* the *Hudson*. In corroboration of this construction, is the fact, that all vessels employed in navigating the river, take a coasting license. I am aware it is said, that the license is given, not under the power to regulate commerce, but the power to lay and collect taxes. When congress have power to do the same act by virtue of distinct powers, they may exercise which they please; and when they profess to act under the power to regulate commerce, as they do in this act, there is no necessity to resort to any other. I need not, therefore, enquire whether the license does not more properly emanate from the taxing power. Under whatever power it is issued, it proves that the vessel has complied with the regulations of congress respecting the coasting trade, and is entitled to all the privileges of coasting vessels. A discussion of this question is superseded by an express adjudication. The language of the Supreme Court is, "To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade." Again; "The license must be understood to be what it purports to be, a legislative authority to carry on the coasting trade."

What is meant
by "internal
commerce."

What, then, is internal commerce?

An answer to this enquiry will necessarily lead to some repetition. It is contended by the appellants, and is decided by the Chancellor, that it comprehends all that navigation where the *termini* of the voyage are both within the same state. Chief Justice *Marshall* has said, that the word "among" may properly be restricted to that commerce

which concerns more states than one. Again : "the enumeration pre-supposes something not enumerated ; and that something, if we regard the language or the subject of the sentence, must be the *exclusively* internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally ; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." What is here said, it must be admitted, conveys no definite idea of what is the *completely* or *exclusively* internal commerce alluded to. In a subsequent part of the opinion, an explanation is to be found. When speaking of inspection laws, he observes, " They form a portion of that immense mass of legislation which embraces every thing within the territory of a state not surrendered to the general government ; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c. are component parts of this mass. No direct general power, over these objects, is granted to congress ; and, consequently, they remain subject to state legislation. If the legislative power of the union can reach them, it must be for national purposes ; it must be when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the union, in the exercise of its express powers—that, for example, of regulating commerce with foreign nations, and among the states—may use means that may also be employed by a state, in the exercise of its acknowledged powers ; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

o the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state ; or to act directly on its system of police."

A definition of what is meant by internal commerce, appears, in part, by the above extract from the opinion of the Supreme Court. To extend it to all its various subjects, would here be entirely useless. The object of the present inquiry is completely answered, by shewing what is not that purely internal commerce spoken of as exclusively subject to state legislation : and I trust I have already shewn, that the navigation of the *Hudson*, a public navigable river, is not included in such internal commerce ; but that it composes a part of the coasting trade, and is, therefore, *subject* to the regulation and control of congress.

General extent of the coasting trade, as settled by *Gibbons v. Ogden*.

In my judgment, then, the case of *Gibbons v. Ogden* decides, that the commerce subject to the control of congress, is the coasting trade, which includes the transportation of passengers. That the coasting trade may lawfully be carried on by licensed vessels, in all the navigable waters of the *United States*, including all rivers approachable from the coasts. If this be so, then the *Olive Branch* was engaged in a lawful trade, and had a perfect right to the navigation of the *Hudson*. I will, therefore, detain the Court but a moment, while I add a few general remarks.

The constitution of the *United States* should be so construed as best to promote the great objects for which it was made, avoiding the two extremes of a liberal or strict construction.

Much difference of opinion exists, on the question of construction to be given to the constitution of the *United States* ; some contending that it should receive a liberal construction, and others that it should be construed strictly. In my judgment, it should be so construed as best to promote the great objects for which it was made. This end will be best answered by avoiding either extreme of the rules of construction, and keeping steadily in view the purposes for which the government was instituted, "to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty." Under the articles of confederation, the states were sovereign and independent—too much so for the mutual safety and prosperity of the whole. The states, therefore, in adopting the federal constitution,

Commercial defects of the articles of confederation ; and the objects of the federal constitution.

parted with a portion of their individual sovereignty, in order to give the head of the confederacy stronger powers, by which to draw closer together the different parts of this widely extended government. Before that time, the several states imposed what duties they pleased, not inconsistent with public treaties, and were perfectly sovereign and independent, as to regulating all other commerce within their respective limits, subject to one restriction only, to wit, that the people of other states should enjoy therein all the privileges of trade and commerce, subject to the same duties, &c. as the inhabitants of such state, provided such restrictions did not prevent the removal of property to another state, of which the owner should be an inhabitant, and that no duties should be laid on property of the *United States*, or either of them.

This power of regulating commerce led to many difficulties and embarrassments, as we learn from the history of the times ; and to prevent a recurrence of those commercial difficulties, was one great and leading inducement to the adoption of the present constitution. Any power, therefore, given to congress, short of the power to regulate that commerce to which the people of the *United States* had access, would not have secured the object so desirable to be attained : and it never could have been intended that, within the territory of a particular state, congress should define the rights and privileges of citizens of other states, while the state legislature should define the rights and privileges of its own citizens, in relation to the same subject. The framers of the constitution never supposed that they were splitting the jurisdiction over the subject, and leaving it liable to most of the difficulties which previously existed. If the several states may still regulate commerce, within the limits of their states, to the exclusion of congress, there is nothing left for congress to act upon. If the power of congress is limited to voyages commencing in one state and terminating in another, then its jurisdiction is much abridged, and much of the act regulating the coasting trade should be repealed.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

Co-tempora-
neous con-
struction of the
constitution,
by acts of con-
gress touching
the coasting
trade.

To show the understanding of those who framed and adopted the constitution, we have only to look at the acts of congress immediately consequent upon its adoption. And we find, that at the first session of the first congress, one of the first acts passed, is "an act for registering and clearing vessels, regulating the coasting trade, and for other purposes," passed 1st September, 1789, containing substantially the provisions of the act of 1793. By this act, licensed vessels are authorised to trade from district to district. By what authority did congress undertake to regulate the coasting trade? The *coasting trade* is a term not found in the constitution. It need not be contended to be the execution of the power to collect taxes, &c. ; for it has been decided to have been an execution of the power to regulate commerce. What commerce? Surely not foreign commerce, nor among the Indian tribes? it must mean, then, "commerce among the several states." Congress, then, passed the act regulating the coasting trade, under the power to regulate commerce among the several states. This was a contemporaneous exposition of the constitution with which all were satisfied; and it was not then thought that state boundaries had any effect or influence upon this kind of navigation. It was not then thought that the coasting trade, or commerce among the states, must consist of voyages from state to state only: that was the discovery of later times. It was then thought that commerce among the states, meant among the people of the states; that this commerce was *internal* as related to the government of the *United States* and its citizens, and as contradistinguished from foreign commerce. It was at that time supposed that the constitution intended to guaranty to the citizens of the whole *United States* an equality of commercial rights and privileges. Hence the restriction on congress, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and hence, also, the subsequent provision, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The framers of the constitution thought it unnecessary to declare the converse of the

last provision, to wit, that the citizens of each state shall be entitled within their own state, to all the privileges and immunities which citizens of other states enjoy within such state.

How is this fact under the principle contended for by the appellants? Citizens of other states, coming from a port in their own state, have a right to navigate freely with their steam boats, in our waters and from port to port, while our own citizens are excluded from such navigation from port to port, unless the voyage extends out of the state. I mention this as an inconsistency growing out of the construction contended for. One leading object of the constitution was to secure an equality of commercial rights to the citizens of the general government, in whatever state they might reside. We ought not to forget that we are the citizens of two distinct, yet connected governments. Each has its proper sphere of action. The powers given to the general government are to be first satisfied. Some of these powers are exclusive, and some concurrent; but when concurrent, the provisions of the general government are paramount. Whether powers are exclusive or concurrent, is to be determined more by the nature of the power itself, than by the phraseology of the constitution. Under the old confederation, the states retained the character of independent and sovereign states: under the present constitution, for certain specified purposes, the distinction of states is partially lost, and we become a single consolidated government. It is in this character that congress executes its powers; and having, in this character, power to regulate commerce among the states, that power must necessarily reach the subject where it exists; and so far as navigation is concerned, it exists where the coasting trade exists, and is therefore subject to the regulations of congress.

We are told that there is great danger of encroachment by the general government, and that the state governments will be swallowed up by it; and therefore that the state laws should be supported. My answer is, if such danger exists, the states should not provoke a termination of their existence,

ALBANY,
Feb. 1825.

Steam-Boat
Company

v.
Livingston.

The powers given to the general government are to be first satisfied. Some of these are exclusive, some concurrent, in which last case, the provisions of the general government are paramount.

For certain purposes the general government is a single consolidated one. In this character congress executes its powers.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

by encroachments on their part ; nor should they submit to usurpation. There is no difficulty in harmonizing, if each government will be content with the powers possessed by it. But why should we more apprehend an abuse of power, or an act of usurpation, by the general than by the state governments ? Both are constituted by the representatives of the people. Every member of the national legislature is a citizen of some state and of course feels his state partialities and perhaps jealousies ; and should be presumed, in the absence of proof to the contrary, equally jealous of the rights of his constituents, as the members of our state legislatures. I am fully sensible of the propriety of preserving the state governments, with all their rights and powers : but this is by no means inconsistent with conceding to the general government its appropriate powers.

Congress have no right, under their power to regulate commerce, to interfere with the ferries of the state, except so far as they are used for carrying on the coasting trade ;

We were cautioned upon the argument, to beware how we admit the authority of congress to regulate navigation within the waters of the *Hudson*, as we should thereby abandon the right to license ferries and receive tolls on our canals. The Supreme Court expressly disavows any authority in congress to interfere with the purely internal commerce or police of a state. Ferries may be subject to the acts of congress, so far as they are used for carrying on the coasting trade ; but those ferries which are the subjects of state grant, if they can be called commercial regulations at all, belong clearly to the internal commerce of the states. We are told that the grant to the plaintiffs is only a ferry from *Albany* to *New York*. If the exclusive grant be really a right of ferry, the plaintiffs may occupy with their boats every ferry in the state, and thus destroy the rights of all others. But there is no pretence for denominating their grant a ferry. To speak of a ferry from *New-York* to *Albany*, is as great an abuse of terms, as to talk of a ferry from *New-Orleans* to *St. Louis* or *Pittsburgh*, or even from *New-York* to *Liverpool*. Those ferries over which the state exercises its appropriate authority, are not connected with the coasting trade ; they are not, in the constitutional sense, commercial regulations. But if they were, they belong to that exclusively internal commerce over which congress has no control. Our right to

regulate navigation upon our canals rests upon a still firmer basis. They are no part of the navigable waters of the *United States* within the act regulating the coasting trade, or the constitution. Congress may, indeed, under the taxing power, impose taxes upon canal boats, as they may upon every species of property within the states; but that gives them no direct power to regulate the navigation upon our canals, or upon our inland lakes and rivers. The authority of congress to regulate navigation is confined to our coasts, bays and navigable rivers.

If I am correct in the views which I have taken of this subject, an injunction can not be granted, whether the respondent carried on what has been denominated a fraudulent intercourse with *New Jersey* or not. I forbear, therefore, an examination of that part of the decree of his honor the Chancellor, which relates to such intercourse.

But even if the conclusions which I have drawn from established premises, be not admitted as absolutely correct and conclusive, is there no *doubt* on the subject? After the highest judicial tribunal in our country has said, that "so much of the several laws of the state of *New-York* as prohibits vessels, licensed according to the laws of the *United States* from navigating the waters of the state of *New-York* by means of fire or steam, is repugnant to the said constitution and void," can it be pretended that the claim of the appellants is no longer doubtful? The plea in the case of *Gibbons v. Ogden* distinctly asserted the right to navigate between different places in the same state. This was part of the issue; yet the Court broadly assert the right of licensed vessels "to navigate the waters of the *United States* by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the state of *New-York* to the contrary notwithstanding." In *Livingston v. Van Ingen*, the late Chancellor *Kent* says, "injunctions are always granted to secure the enjoyment of statute privileges, of which the party is in the actual possession, UNLESS THE RIGHT BE DOUBTFUL." This is undoubtedly the correct rule, and the true result of an examination of the adjudged cases.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

Nor can they interfere with the navigation upon our canals; for they are not navigable waters, within the meaning of the constitution, &c. So of our inland lakes & rivers.

But congress may, under their taxing power, tax canal boats, or any other property.

The authority of congress to regulate navigation is confined to our coasts, bays, & navigable rivers.

An injunction should not be granted to secure a claim to statute privileges if the right be doubtful.

ALBANY,
Feb. 1825.

Steam-Boat
Company
v.
Livingston.

CASES IN THE COURT OF CHANCERY.
If any thing were wanting, in addition to the express and unequivocal language of the Supreme Court of the *United States* to shew that the appellants have not a *clear right, free from doubt*, it is found in the peculiar situation in which an injunction will place the citizens of this state. They are forbidden rights, which are open to, and may be enjoyed freely by all the world beside. If the injunction is granted, it can not secure to the appellants their monopoly. The citizens of other states, with their steam boats, have full right to navigate our waters and carry on a profitable business, commencing or terminating their voyage in their own state ; while our own citizens must stand with their arms folded and look on, unless they, too, terminate their voyages without the state. If this deplorable state of things necessarily results from the constitution and laws of our country, it must be submitted to, with what grace we can ; but is it not a powerful argument to prove that the reasoning which leads to such a result is unsound ?

For these reasons, I am of opinion that an injunction ought not to be granted ; and that that part of the decree of his honor the Chancellor, refusing an injunction, be affirmed.

For affirm-
ance, 22—for
reversal, 9.

BOWMAN, BRAYTON, BURROWS, BURT, CLARK, CRAMER,
DUDLEY, EARLL, ELLSWORTH, GARDINER, KEYES, LE-
FERTS, LYNDE, MALLORY, MCCALL, MCINTYRE, MORGAN,
REDFIELD, WARD, WOOSTER, WRIGHT, Senators, concurred.

OGDEN, Senator, gave no opinion.

A majority of the Court concurring with the Chief Justice, it was thereupon ORDERED, ADJUDGED, and DECREED, that that part of the decree of his honor the Chancellor, appealed from be affirmed, with costs, &c.

END OF FEBRUARY SESSION.

I N D E X.



INDEX

OF THE

PRINCIPAL MATTS

CONTAINED IN THIS VOLUME.

A

ACTION.

1. The endorsement and delivery of a promissory note to a bank, on its request, is a sufficient consideration for an undertaking, on the part of the bank, to charge the endorser by a regular notice of non-payment; and if they neglect to do this, the holder or owner of the note, to whom the promise is made, may maintain an action against them, and recover damages for the neglect. *Bank of Utica v. Smedes.* 662

2. A count for such neglect would be good as a count for a misfeasance, the receipt of the note, and neglect to perform the undertaking, being properly a mismanagement of the business undertaken. The acceptance of the note by the bank, may well be considered the first step in the execution of the contract, and no other consideration is necessary. *id*

See Legacy, 1. Maintenance and Champerty.

ADMISSIONS.

See Evidence, 9 to 15.

ADVERSE

See Eje

ADVERSE

See Execution, 1,
1,

AFFIDAVIT

See Attorney, 1,
5. Evidence,
Venue.

AG

See

AGREEMENT

See Maintenance
Specific P

ALIAS

See

AMENDMENT.

1. Judgment and execution by A against B, but by accident the record was not filed; then judgment and execution in favor of C against B. Both executions being levied on the same personal property, which was sold, and the avails paid over, by order of this court, in certain portions, to A and C, before the latter discovered that A's judgment was imperfect. Then C, on discovering this, applies for a preference as to the whole of the money. This was denied, and on A's application he was allowed to file his record *nunc pro tunc*, it appearing that his execution was first levied, and C having full notice of A's judgment, before his (C's) judgment was obtained. *Chichester v. Cande.* 39

2. The doctrine and cases as to amending judgments, by Mr. Mitchell, *arguendo*, sanctioned by the court, in *Hart v. Reynolds.* 42, note (a)

See Bail. Slander, 4.

APPEAL.

1. It is erroneous for a court of common pleas to proceed as a court of error, on appeal from a justice, and try the cause without jury, even though both parties elect this form of trial. *Coven v. Bush.* 343

2. Though on appeal, pursuant to the statute, (*sess. 47, ch. 238, s. 36, 37*) the justice do not file his return till after the first day of the term of the common pleas next after the appeal; they ought not to quash the return, but proceed thereon when the return comes in. *Kellogg, Ex parte.* 372

3. The fact, that the costs were paid to the justice, need not be endorsed on the appeal bond. *id*

4. The notice of appeal served on the justice, pursuant to the act, (*sess. 47, ch. 238, s. 36*) did not state that the party appealed to the court of common pleas of, &c. but the appeal bond recited that the appeal was to that court; and the justice made a return; *held regular.* *Clarke, Ex parte.* 379

5. It seems the party can not object that the notice of appeal is defective, but this lies with the justice only. If he deem

himself sufficiently informed, and return accordingly, it is enough. *id*

See Witness, 5.

APPEARANCE AT THE CIRCUIT.

See Practice, 13.

ARBITRAMENT AND AWARD.

1. The arbitration bonds were dated August 21st, 1813, and the award was dated August 23d, 1813, and recited bonds dated the 21st of August, *last past*; *held*, that if a correct recital were necessary, it should be construed, in support of the award, to refer to the day, i. e. the 21st *last past*, instead of the month, i. e. August, *last past.* *Brown v. Hankerson.* 70

2. Where the award was, that H should deliver the said farm to B, &c. and that B should pay H certain moneys; *held*, that the delivery of the farm was a consideration for the money, and the award being uncertain, in not describing the farm by reference or otherwise, the award of the money was also void. *id*

3. If that part of the award which is void, is so connected with the rest, as to affect the justice of the case, the award is void for the whole. *id*

ASSESSMENT OF DAMAGES.

See Damages, 3, 4.

ASSIGNEE.

1. An assignee of a chose in action takes it subject to all equities existing against it at the time of the assignment, though he have no notice of such equity. *Chamberlin v. Day.* 353

2. Where W purchased a judgment of C. against D, without notice that D had previously purchased a judgment against C; *held*, that D might, notwithstanding, set off his judgment so purchased, against the judgment in favor of C. *id*

3. Assignee of a judgment against the plaintiff, allowed, on motion, to set it off against the judgment in favor of the plaintiff against the assignee. *id*

See Husband and Wife.

See Execution, 5.

ASSUMPSIT.

See Maintenance and Champerty.
Partnership. Warranty, 1.

ATTACHMENT.

See Costs, 5. Jurisdiction. Jury,
2. Practice, 5 to 8.

ATTORNEY.

1. On moving to set aside proceedings against an attorney, for irregularity, because they were as against a common person, the attorney need not state, in his affidavit, that he was a practising attorney, &c. *Coll v. Gregory.* 22
2. But it is enough that he swear he was an attorney, which throws it upon the other party to shew that he had not practised within the year. *id*
3. Construction of the act, (1 R. L. 417) prohibiting an attorney to buy a chose in action, for prosecution. To bring an attorney within the act, there must have been an intent to prosecute. *Williams v. Matthews.* 252
4. An attorney, or other officer of the court, is never privileged from arrest, when sued with another, though during the actual sitting of the court, and during his attendance at court. *Gay v. Rogers.* 368

AUTHORITY.

See Devise. Executors and Administrators.

AVOWRY.

See Distress.

AWARD.

See Arbitrament and Award.

BAIL.

Special bail cannot object to an amendment of the *ac etiam.* *Blue v. Stout.* 354

See Practice, 5 to 8. Witness, 4, 5.

BANK.

See Action, 1, 2. Statute, 2.

BILL OF EXCEPTIONS.

1. Exceptions to a judge's or court's opinion should be noted down upon the trial, or they can not be used in a bill of exceptions. *Shepherd v. White.* 32
2. On settling the bill, notice of time and place when and where this is to be done, should be given to the defendant in error. *id*
3. Otherwise the judge or court will not be compelled by mandamus to execute the bill. *id*
4. And if executed, it will be set aside *id*
5. Whenever a bill of exceptions is signed, under circumstances wherein the supreme court would not compel its execution by mandamus, it will be set aside on motion. *id*
6. General rule as to frivolous bills of exception. 439

See Costs, 17. Rule.

BILL OF SALE.

See Fraud.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Promissory Notes.

BOND.

1. A surety is not liable beyond the penalty of his bond. *Clark v. Bush.* 151
2. The rule seems to be the same as to the principal. *id*

3. The English and American cases upon these two heads considered. *id*

order on the calendar is determined by the date of the first issue. *Grinwald v. Stewart.* 16

See Bond and Warrant of Attorney.
Bond to perform Covenants.
Release. Usury.

BOND & WARRANT OF ATTORNEY.

1. The judgment and proceedings in entering up a judgment in one term can not be made to relate to, and be entitled as of a term preceding. *Bennet v. Davis.* 68
2. And where a bond and warrant of attorney to confess judgment were executed by two, on the 10th April, 1824, and one of them died on the 14th April, a judgment entered thereon during the subsequent May term, as of the preceding February term, was set aside as irregular. *id*

BOND FROM GOALER TO SHERIFF.

See Pleas and Pleading, 20 to 30.

BOND OF INDEMNITY.

See Release.

BOND TO PERFORM COVENANTS.

1. In an action on a bond for the performance of covenants, and an assignment of breaches, the execution will not be set aside for a mere informality of the verdict in not assessing damages for the breach, but referring the damages to the detention of the debt. *Updegroff, Matter of.* 31
2. Debt on bond to perform covenants—issue and verdict for plaintiff, but no assignment of breaches nor assessment of damages by the jury; the plaintiff may afterwards assign breaches, and have his damages assessed upon a writ of inquiry, under the statute, (*sess. 36, ch. 56, s. 7, 1 R. L. 518.*) *Rogers v. Coleman.* 62
3. Of the writ of inquiry to assess damages after demurrer, &c. upon a bond to perform covenants. 62 note (a)

C

CALENDAR.

Where there are several issues in law joined at different times, in the same cause, its

CANALS.

See Constitutional law, 20, 21.

CASE.

See Practice, 12.

CERTIORARI.

1. A return to a certiorari will be set aside, if it be drawn by the attorney for the plaintiff in error. *Fox v. Johnson.* 20
2. On certiorari, the defendant can not compel a return. *Marsh v. Eastman.* 58
3. His course is to *non pros* the plaintiff in error, if he does not cause a return to be made. *id*
4. The return to a certiorari must contain a complete history of the proceedings in itself—not by reference to the affidavit on which it is founded. *Mann v. Swift.* 61
5. An affidavit for a certiorari must not be entitled in this court. *Nichols v. Cortes.* 345

CHAMPERTY.

See Maintenance and Champerty.

CHOSE IN ACTION.

See Attorney, 3. Husband and Wife.

CHOSE IN POSSESSION.

See Husband and Wife.

COASTING TRADE.

See Constitutional law, 11 to 21.

COLLECTION OF COSTS.

See Costs, 5.

COMMERCE.

See Constitutional Law, 11 to 21.

COMMISSIONERS OF LOANS.

See Mortgage.

CONDITION.

The words, "and these presents are upon this condition," viz. *that the lessee shall suffer the lessor to enjoy a way reserved, through the demised premises, without obstruction*, are sufficient, in a durable lease, to make the estate a conditional one, without an express clause of re-entry; and if the way be obstructed, ejectment lies. *Jackson v. Allen*. 220

See Lease.

CONFESSIONS.

See Evidence, 9 to 15.

CONSENT RULE.

See Ejectment, 5.

CONSIDERATION.

See Action, 1, 2. Fraud and Undue Influence, 4, 10, 11.

CONSTITUTIONAL LAW.

1. The act to suppress duelling, passed Nov. 5, 1816, (*sess. 40, ch. 1*) which declares that any person convicted of challenging another to fight a duel, &c. "shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this state, is constitutional; and a conviction and judgment of disqualification under it, are therefore legal and valid. *Barker v. The People*. 636
2. The provision in the constitution of the *United States*, that cruel and unusual punishments shall not be inflicted, is a restriction upon the government of the *United States* only; and not upon the government of any state. *id*

3. The constitution of the *United States* does not regulate the punishment of crime against a state.
4. The state legislatures can not establish arbitrary exclusions from office, or any general regulations, requiring qualification which the state constitution has not required.
5. The power of the state legislature, in the punishment of crimes, is not a special grant or limited authority, but a part of the legislative or sovereign power of the state, to maintain social order, and to take life, liberty, and all the rights of both when the sacrifice is necessary.
6. The provision in the state constitution that the judgment upon impeachment shall not extend farther than a removal from office, and disqualification to hold office, is a restriction, not an authority.
7. The power of the state legislature, over crimes, is a power to produce the end by adequate means.
8. But there are numerous regulations in the constitution, which operate as restrictions upon this power.
9. Examples,
10. Eligibility to office is not so secured. In the constitution of disqualification to hold office, a punishment, is not incompatible with that part of the constitution which provides that each house shall be the judge of the qualifications of its own members.
11. The acts of the legislature of this state granting to *Robert R. Livingston* and *Robert Fulton* the exclusive navigation of all the waters within its jurisdiction, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the *United States*, which authorizes congress to regulate commerce so far as those acts prohibit vessels licensed, according to the laws of the *United States*, for carrying on the coasting trade from navigating those waters by means of fire or steam. *N. R. S. Boat Company v. Livingston*. 713
12. The terms "coasting trade," mean commercial intercourse, carried on between different districts in different states, different districts in the same state, or different places in the same district, on the sea coast, or on a navigable river. *id*

13. The power to regulate commerce between the states, conferred by the constitution, extends to the coast.
14. What is meant by the commerce of the state."
15. The constitution of the United States should be so construed as to give effect to the great objects for which it was framed, avoiding the two extreme constructions.
16. Commercial defects of the federal constitution considered.
17. The powers given to the federal government are to be distinguished from those reserved to the states; these are exclusive and when concurrent with the general government.
18. For certain purposes the federal government is a sovereign; this character of sovereignty is not universal.
19. Congress has no power to regulate commerce with the foreign nations so far as they are engaged in coasting trade.
20. Nor can the federal government regulate navigation upon the rivers.
21. But, under the constitution, the federal government can regulate tax on the navigation of the rivers.

See *Co*
id

See

See

not extend to the fees of counsel, &c. but is confined to the incidental expenses of the referees. *Gay v. Patterson.* 29

7. A motion to stay proceedings in a second suit, till the costs of a former suit for the same cause are paid, is in season, if made at any time while the latter is in a course of litigation. *Jackson v. Miller.* 57

8. Thus, the court will hear it after verdict for the plaintiff in the second cause, subject to the opinion of the court, and a case made and noticed for argument by the defendant. *id*

9. Where the original plaintiff is a non-resident of this state, his attorney is liable to pay the cost of setting aside an attachment for irregularity, granted against the sheriff for not bringing in the body. *The People v. Marsh.* 334

10. The people are merely a nominal party, and the case is within the spirit of the 13th rule of *January term, 1799.* *id*

11. Where a verdict is set aside, on the ground that it was against the weight of evidence, this should be on payment of costs by the party against whom the jury found. *Jackson v. Thurston.* 342

12. A plaintiff recovering at the circuit for a trespass under the statute, (1 R. L. 525-6, s. 29) a sum which, when trebled, amounts to less than \$50. is not entitled to recover treble costs. *Hasbrouck v. Schoonmaker.* 348

13. A justice has jurisdiction of such an action. It seems, therefore, that it does not necessarily involve a question of title to land. *id*

14. In an action arising *ex contractu*, against several defendants, some of whom succeed, and others have a verdict against them, the former are not entitled to costs. *Avery v. Curtiss.* 369

15. In the court of common pleas of the city of New-York, the plaintiff has costs, though he recover less than \$50, if his recovery exceed \$25. And this though the action might have been brought before a justice of the peace. *Van Lee v. King.* 375

16. Double costs are not allowed of course to the defendant in error, on affirming the judgment; but it should be shewn that the execution was actually delayed by the

writ of error; and this should be proved to the taxing officer before he is warranted in doubling the costs, within the statute, (1 R. L. 346, s. 14.) *Stone v. Burt.* 379

17. Where a judgment is reversed, on error to the common pleas, upon a bill of exceptions taken there, costs should be taxed for the bill at the common pleas rate only. *Clarke v. Rathbun.* 380

18. Where a suit was brought in the C. P. and removed by the defendant into the supreme court by *habeas corpus*, and the plaintiff neglected to follow the suit here, but brought another action for the same cause in the C. P. held, that the court below might stay the proceedings of the plaintiff in the second suit, till the costs of the first were paid. *Stone, Ex parte.* 380

19. Case, for obstructing a stream, and flowing the plaintiff's land. Plea, the general issue. The defendant, on the trial, gave evidence to shew that he, and those under whom he claimed, had so obstructed the stream for 20 years. Verdict for the plaintiff, \$90. Held, that he was entitled to supreme court costs, as the title to the freehold was drawn in question, within the statute, (1 R. L. 344, s. 4.) *Tunnickiff v. Lawyer.* 382

20. Motion, by several different defendants, on one set of affidavits, in divers causes, at the suit of the same lessors of the plaintiff; opposed on one set of affidavits entitled in all the causes, and the motions denied with costs. Held, that there should be only one taxation in all; the services of the attorney and counsel for the plaintiff to be taxed as if there were only one cause, but clerk's fees to be allowed in the several causes, according to *Boyce v. Thompson*, (20 John. 274.) *Jackson v. Garnsey.* 385

See Appeal, 3. Judgment as in case of non suit, 1, 2. Practice, 16, 17.

COSTS, COLLECTION OF.

See Costs, 5.

COSTS DOUBLE.

See Costs, 1, 16.

COSTS, STAYING PROCEEDINGS TILL PAYMENT OF.

See Costs, 2, 7, 8, 18.

COSTS, TAXATION OF.

See Costs, 3, 4, 6, 17, 20.

COSTS, TREBLE,

See Costs, 12, 13.

COSTS, WHEN DEFENDANT RE- COVERS.

See Costs, 14.

COSTS, WHETHER COMMON PLEAS OR SUPREME COURT.

See Costs, 19.

COURT OF COMMON PLEAS.

See Appeal, 1, 2, 3, 4, 5. Costs,
15. Habeas Corpus. Mandamus,
1, 2. Witness.

COURT OF EQUITY.

See Fraud and undue Influence.
Husband and Wife. Injunction.
Parties. Specific Performance.

COURT OF ERRORS.

See Practice, 26 to 30.

COURTS OF JUSTICES OF THE PEACE.

See Appeal, Certiorari, Costs, 13.
Jurisdiction.

CRIMES.

See Constitutional Law, 1 to 10.
Larceny.

D

DAMAGES.

1. In assumpsit on a note payable in specific
articles, the measure of damages is the

highest market price of those articles at
any time between the note falling due
and the time of the trial. *West v. Went-*
worth. 82

2. So in trover, the damages are measured
by the highest price intermediate the time
of conversion and trial. *id*

3. Where the general money counts are
joined with one on a promissory note in
the same declaration, it is erroneous for
the clerk to assess the damages, without
first entering a *nolle prosequi* as to the
money counts. *Beard v. Van Winkle.* 335

4. In such a case, the defendant can not com-
pel the plaintiff to enter a *nolle prosequi*,
and it is at his option, to assess dama-
ges by a jury, though his claim be founded
on the note alone. *id*

See Bond to perform Covenants.
Interest. Sheriff, 3.

DECLARATION.

See Pleas and Pleading, 7, 8, 19,
20, 31, 32.

DEED.

1. A deed given by a sheriff upon a previ-
ous sale on execution relates back to, and,
in judgment of law, is executed at the
time of the sale. *Jackson v. Ramsay.* 75

2. Where there are divers acts concurrent
to make a conveyance, estate or other
thing, the original act shall be preferred ;
and to this the other act shall have rela-
tion. *id*

3. Cases supporting this rule considered ;
and applied to a deed executed more than
4 years after the sheriff's sale. *id*

See Ejectment, 2. Executors and
Administrators, 4. Fraud and
undue Influence. Pleas and Plea-
ding, 1 to 4.

DEMURRER.

See Pleas and Pleading, 5. Refer-
ence, 2.

DEPUTY SHERIFF.

See Execution, 6, 7.

DEVISE.

1. *H* made his will, by which he devised his house, &c. to his wife, and a comfortable maintenance to her, out of the income of his real estate, so long as she remained his widow; to his two sons, *E* and *I*, the use and improvement of all his real estate, except their mother's maintenance during her natural life; and directed that after her decease, all his real estate should be sold; and gave to his two sons, *E* and *I*, 150*l*. a piece, and to his 5 sons all the rest of his estate of all kinds, to be equally divided between them, and appointed *L*, *D*, and his son *I*, executors for the purposes in his will mentioned. *L* and *D*, strangers to the family, alone, proved the will, and took upon themselves its execution. The testator died, leaving a widow and his 5 sons, and the children of a deceased daughter. The widow having died, *I*, having also died without issue, and *E* and another son having died leaving issue, the two executors, *L* and *D*, sold the real estate. *Held*, that the objects of the testator, having been, in a great measure, defeated, and his intentions in giving the power frustrated, the power itself failed; and the sale was consequently void, so far as it depended upon the power; but the two surviving sons having also conveyed all their interest to the grantee of the executors; *held*, that their conveyance passed 2-5 of the real estate; that the power being inoperative, the real estate descended to the heirs at law. *Sharpsteen v. Tilton*. 651

2. The purposes of a testator, in giving a power by his will to sell real estate, must be ascertained from all the provisions of the will; and the objects of the power must be considered in connexion with the power itself. *id*

3. A power to sell real estate in a will, fails when its objects are unattainable. *id*

4. Where one directs his executors to sell land, *it seems* this is a naked authority, not coupled with an interest. There is no estate vested in the executors as such;

power would not survive at common law. (*Opinion of the supreme court, not considered on error.*) *id*

5. *It seems*, that the 11th sec. of the act concerning wills, (1 *R. L.* 366) merely provides for the case of an executor who refuses to act; but where executors are directed to sell the land, thus having a naked authority, if one die, though he never qualified as executor, the power is gone. (*id*) *id*

6. *It seems*, that where land is devised to executors to be sold, the survivor or survivors might sell at common law. (*id*) *id*

DISTRESS.

1. The 13th section of the act concerning distresses, &c. giving a right to distrain goods within a certain time after they are removed, is confined to the continuance of the lease, or the continuance of the landlord's right and the tenant's possession.— Though the landlord's right continue, if the tenant's possession have ceased, there can not be a distress, within that section, of the tenant's goods removed off the demised premises, though such distress be made within 30 days after the rent fell due. *Burr v. Van Buskirk*. 263

2. An avowry of taking goods off the demised premises, for rent arrear, should show affirmatively, that such possession continued, if the lease have expired, or it will be bad on general demurrer. *id*

3. The 13th section of the act concerning distresses, &c. (1 *R. L.* 437) as amended by the act, *sess.* 43, *ch.* 194, *s.* 7) authorizes the taking of goods which are removed off the demised premises, within 30 days after the rent for which they are distrained falls due; but they can not be distrained for rent which fell due more than 30 days previous to the distress. *id*

4. The common law did not allow a distress off the premises. *id*

5. Previous to a distress for rent in the city of *New-York*, the landlord must file an affidavit with the clerk of the city and county, that the rent distrained for is due, according to the act, (*sess.* 38, *ch.* 153.) *id*

5. The avowry must aver that this was done, or it will be bad on demurrer. *id*

6. An avowry substantially bad in part, is

bad for the whole. *E. g.* in an avowry for rent arrear, of taking goods off the demised premises, if only a part of the rent avowed for is the subject of distress, the avowry is bad for the whole. *id*

DOUBLE COSTS.

See Costs, 1, 16.

DRUNKENNESS.

See Specific Performance, 9.

DUELLING.

See Constitutional Law, 1 to 10.

E

EJECTMENT.

1. In ejectment, an objection can not be made at the bar that the plaintiff failed at the trial to make out a title, unless such objection was previously made at the trial. *Jackson v. Collins.* 89
2. One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. *Jackson v. Collins.* 89
3. In ejectment, where the declaration, verdict and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of *hab. fac. possessionem*, subject to be put right by the court, if he takes too much. *Jackson v. Rathbone.* 291
4. But where the judgment is upon a special verdict, describing the premises, the plaintiff is confined to such location, in the first instance, and the sheriff may refuse to give him possession beyond it. *id*
5. Where 2 defendants are sued jointly in ejectment, they have no right to enter into separate consent rules in the name of each alone. *Jackson v. Stiles.* 356
6. Several demises added in ejectment on payment of costs, it appearing that the lessors sought to be added had a substantive legal title. *Jackson v. Travis.* 356
7. A defendant in ejectment, though he settled under color of a *bona fide* purchase on

a military lot, may be turned out of possession, without pay for his improvements, within the statute, (1 R. L. 303, s. 2, 4; 3 W. & S. 399; sess. 26, ch. 78, s. 2) unless he shew that he settled there before the 8th day of April, 1813, when the last act concerning lands in the military tract passed. *Jackson v. Chapman.* 350

See Costs, 5. Pleas and Pleading, 1 to 4.

ELIGIBILITY.

See Constitutional Law, 1 to 10.

ELIZORS.

See Sheriff, 1 to 4.

EQUITY.

See Husband and Wife.

ERROR.

See Costs, 16, 17. Evidence, 15. Practice, 16, 17, 18, 19, 22, 23, 24, 26, 27, 28, 29, 30. Reference, 4.

ESCAPE.

1. A prisoner enjoying the jail limits under a bond of surety, conditioned that he shall remain a true and lawful prisoner, was arrested on a charge of felony, and committed to close confinement; and while so confined, broke the gaol and escaped: held, that the surety was not liable. *Bradford v. Consulhus.* 122

See Pleas and Pleading, 20 to 30.

EVIDENCE.

1. Rule made that the defendant deposit deeds, which he relied on in defence of an ejectment brought against him, in the clerk's office of M. to the end that the plaintiff might, with witnesses, inspect the same. *Jackson v. Jones.* 17
2. This rule made on affidavit of the lessor of the plaintiff that he expected thus to be enabled to prove the deeds forgeries. *id*
3. The judgment of a court of concurrent jurisdiction, directly upon a point, is conclusive between the same parties, upon the same matter coming directly in question in another suit. *Gardner v. Bucklee.* 123

4. And this, whether it be pleaded, or given in evidence under the general issue. *id*
5. It is conclusive, whether it appear upon the face of the record in the former suit, that the same matter was tried and passed upon, or not. *id*
6. If it was, in fact, so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried upon the pleadings in the record. *id*
7. Where B sued G upon a promissory note in the marine court, and G pleaded the general issue, with notice that the note was given upon the fraudulent sale of a vessel by B to G, which was the question upon the trial, and the verdict was for the defendant; and afterwards B sued G in the common pleas, upon another note given upon the same purchase; *held*, that upon the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud, and were a conclusive bar to the second action; that the proper course was to give the record of the marine court in evidence, and then shew by parol evidence, (e. g. by the justice who tried the first cause) that the same question had been tried before him. *id*
8. Whether, in *assumpsit*, a former trial for the same cause may be given in evidence under the general issue? *Quere.* *id*
9. The acts or admissions of executors are not evidence against heirs or devisees. *Osgood v. Manhattan Co.* 611
10. Thus, a petition to the surrogate by executors, for a sale of real estate of their testatrix, accompanied with a sworn account of the personal estate, is not evidence to shew the insolvency of the ancestor at the time she conveyed the real estate in question to certain persons, in an action by a creditor against her heirs and devisees, seeking to shew that such conveyances were voluntary and fraudulent, whereby the subject of them became assets in the defendants' hands. *id*
11. Even a judgment against executors is not evidence against the heir. *id*
12. To make the confessions of one man evidence against another, they must have a joint interest in possession. *id*
13. The confession of a grantor, or his executors, after the grant, are not admissible in evidence, to prejudice the rights of the grantee. *id*
14. Whether the confession of one of a corporation aggregate be evidence against the company? *Quere.* *id*
15. If improper evidence be given in the court below, though it be merely cumulative, the judgment will be reversed. *id*
16. When the court will compel the party to produce papers, for the purposes of evidence. *Brush v. Gibbon*, 18, note (a.)

See Legacy, 2. Partnership, 2.
Promissory note, 14. Witness.

EXCEPTIONS.

See Bill of Exceptions.

EXECUTION.

1. After a *fi. fa.* has been levied, the plaintiff can not withdraw it, and issue a *ca. sa.* *Cutler v. Coker.* 30
2. A judgment creditor has no right to redeem under the 3d section of the act of April 12th, 1820, (*sess.* 43, *ch.* 184) unless his judgment be a lien on the land which he seeks to redeem. *Hurd, Matter of* 35
3. It cannot be a lien where the land of the debtor is sold and conveyed either by the debtor or by the sheriff, before the judgment of the creditor claiming to redeem is docketed. *id*
4. And though it be insisted that the sale was fraudulent and void as to creditors, the court will not try this question on motion. *id*
5. Land passes by a general assignment under the insolvent act, and a creditor whose judgment against the insolvent is perfected after the assignment has no lien; and, therefore, cannot redeem within the act, (*sess.* 43, *ch.* 184, *s.* 3.) *Marsh, Matter of.* 69
6. A deputy sheriff may complete an execution by sale and conveyance, after the sheriff goes out of office, provided the execution was levied before. *Jackson v. Collins.* 79

7. A deputy sheriff who is plaintiff in, or assignee of a judgment, may purchase under an execution thereon directed to his principal. *id*

8. Where a sheriff levied on a horse under a *fi. fa.* and conveyed him to the plaintiff in the *fi. fa.* who directed him to return the horse to the defendant, which he did, and left him there in the defendant's possession, who sold the horse to *R.* who sold him to *B.* who purchased *bona fide*, without notice of the levy, from whom the sheriff took him, and sold him at auction under the execution; the first sale to *R.* was also *bona fide* and without notice of the levy; in an action by *B.* against *R.* upon a breach of the implied warranty of title, held, that *B.* was entitled to recover. *Rees v. Barber.* 272

9. Merely leaving property levied upon in the possession of the defendant in the execution, though with the plaintiff's consent, is not, *per se*, fraudulent, either as against subsequent creditors or purchasers. *id*

10. Otherwise, where the sheriff is directed to delay the execution or sale. *id*

11. A sheriff, who advertises for sale on but one execution, can not sell under that and another execution, coming subsequently to his hands, by virtue of the same advertisement. *Matter of Mascraft.* 334

12. On a sale of lands, the whole purchase money should be inserted in the certificate of sale. *id*

See Amendment, 1, 2. Bond to perform Covenants, 1. Ejectment, 3, 4, 7. Mandamus, 1. Practice, 16, 17. Sheriff, 4, 5.

EXECUTORS AND ADMINISTRATORS.

1. A contract, by an administratrix, to convey lands of her intestate, when a surrogate's order for that purpose shall be obtained, does not vest an interest, though an order be afterwards obtained. *Bridgewater v. Brookfield.* 299

2. Such a contract is void, and incapable of being enforced either at law or in equity, both because the administratrix has no interest, and as being contrary to the policy of the act authorising administrators to sell the real estate of their intestate. *id*

3. An administrator has no interest in, or control over the real estate of his intestate; and though after a contract to sell land when a surrogate's order shall be obtained for that purpose, an order be actually obtained, the administrator takes no beneficial interest, which can enure to make the contract binding, even if it were not contrary to the policy of the law. *id*

4. The cases which hold that where one conveys without title, and afterwards becomes owner, this shall enure to the benefit of the grantee, mean that the grantor must acquire a beneficial interest in the premises sold, not a mere naked authority to sell. *id*

See Devise, Evidence, 9 to 13.
Legacy, 4.

FACTOR.

1. Letters of instruction from a merchant to his consignee and factor, not expressly mentioning a price below which goods consigned for sale shall not be sold, but merely communicating a belief that the excellent quality of the goods, will command a certain price, and expressing it as the sum confidently expected to be realized on a sale, will not be construed as fixing the minimum price at which the goods shall be sold; and a sale for a less sum by the factor, in good faith, and without negligence, will not be deemed a breach of instructions, nor render the factor liable in damages. *Pianna v. Barclay.* 281

2. Though a factor disregard his instructions, the principal, after advice of this fact, ought to dissent, and give notice of his dissent in a reasonable time; otherwise, his assent to his factor's acts will be presumed. *id*

FEEs.

See Costs. Sheriff, 5. Witness, 3.

FEME COVERT.

A *feme covert* may be imprisoned on a *ca. sa.* with or without her husband; though otherwise as to *meane process.* *M'Kinstry v. Davis et ux.* 339

See Husband and Wife.

FIERI FACIAS.

See Execution.

FORFEITURE.

See Lease.

FRAUD.

1. The possession of goods continuing in the vendor after sale, is not conclusive, but only, *prima facie*, evidence of fraud as to creditors, and may be explained. *Bussell v. Hopkins.* 166

2. It is a sufficient explanation that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor was in pursuance of some agreement not inconsistent with honesty in the transaction; as where a tenant sells oxen to his landlord, in payment of rent, upon an agreement that the former should retain them to work his farm. *id*

3. So where *D.* mortgaged a mare, and various other personal chattels, to *H.*, to secure an honest debt, but retained possession of the mare, with *H.*'s consent, in order to settle and close *D.*'s business as constable, he having no other horse, and also retained possession of the other articles to carry on his business; *held*, a sufficient explanation, and that this was not fraudulent as to creditors. *id*

4. A bill of sale of chattels, declaring that it is to secure a debt, and providing that, on payment of the debt by the articles or otherwise, the surplus and remaining articles shall be released to the vendor, is a mortgage; and possession of the chattels continuing in the mortgagor, is not evidence of fraud. *id*

English and American cases collated and considered, upon the question, whether the possession of goods remaining with the vendor be, in any case, more than *prima facie* evidence of fraud as to creditors, and whether this may not in all cases be explained. 189 to 206 note (1.)

See Execution, 8 to 10.

FRAUD AND UNDUE INFLUENCE.

1. W. a man, 74 years of age, owning a considerable real estate, the father of 7 children, and whose wife was sickly and irritable, was troubled for several years with dissensions among his children about the management of his property, his wife taking part with all his children on one side, except Wm. and J. two of his sons,

who took part with him; and the dissensions ran so high that the mother and the children who took part with her, departed, leaving W. and his two sons Wm. and J. in possession of the property, the management of which was confided by their father to them, as it had been for some time before the family was broken up. W. was credulous and easily led by Wm. and shortly after his wife left him, he was sued in a Justice's Court for her board; and on asking Wm.'s advice, Wm. told him that if he intended giving him any thing he wished he would do it; that, as he and his mother were conducting, he would soon have nothing to give. W.'s fears being alarmed by a belief that his wife would dissipate his property, in order to place it beyond the reach of debts which she might contract, he was induced to convey most of his real and personal estate to these two sons, in fee, amounting to more than \$9000, and a farm, &c. to Wm. in trust for another son; but which trust was declared by parol only. Though he had before declared an intention to give all his estate to Wm. and J. by way of advancement; and though they executed to him a bond and mortgage to secure his and his wife's maintenance, and \$50 a year, &c. during their lives; yet, *held*, that the conveyance, executed under such circumstances, was void, as being caused by fraud, undue influence, and unfounded alarm, excited or countenanced by Wm.; and being also for an inadequate consideration; and though J. might have had no part in bringing it about; yet, *held*, that it was also void as to him. *Whelan v. Whelan.* 537

2. To warrant relief, for any cause, in a court of equity, (e. g. undue influence in procuring a conveyance) it must be stated in the bill; but the charge need not be direct; it is sufficient if, on a hearing upon the pleadings and proofs, the ground of relief can be gathered from an examination of the whole bill. *id*

3. A conveyance obtained by children from a father will not be sanctioned by a court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them, the conveyance being also for an inadequate consideration. *id*

4. A conveyance by a father 74 years of age, his wife being nearly 70 years of age, and in delicate health, to his two sons, of real and personal estate worth more than

\$9000, taking from his sons a bond and mortgage to secure his and his wife's maintenance, and an annuity of \$50, during their lives; *held*, to be for a consideration grossly inadequate; it not appearing to be intended as an advancement. *id*

5. If a representation be made by one to another who is going to deal in a matter of interest upon the faith of that representation, the former shall make it good. *id*

6. He who bargains, in a matter of advantage, with a person, placing confidence in him, is bound to show that a reasonable use has been made of that confidence. *id*

7. One falsely supposing his estate in danger, conveys it to his sons, who know that it is not in danger, but neglect to set the grantor right; this concealment is a sufficient ground for avoiding the conveyance. *id*

8. Where a grant is made by an aged father to his children with whom he lives, who have the management of his property, and in whom he reposes particular confidence, if a court of equity sees that any arts or stratagems, or any undue means, or the least speck of imposition, or the least *scintilla* of fraud entered into the bargain, it will avoid the grant. *id*

9. A deed procured by fraud or undue influence is void and will be set aside in equity, not only as against the one who practiced the fraud or exerted the influence, but as to third persons who have acquired interests under it, though they may be perfectly innocent; thus undoing the whole transaction. *id*

10. Marriage is a valuable consideration; and a voluntary deed ceases to be so, if a marriage be induced by its provisions; but it should appear in evidence that it was the cause of the marriage. The mere fact, that one holding a voluntary conveyance of property marries, will not make the conveyance good. *id*

11. Whether a marriage induced by a conveyance or settlement obtained by fraud or undue influence will make it good? *Quere.* *id*

12. All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties to a bill in equity, if within the jurisdiction of the court; but to a bill filed against one to set aside a deed of bargain and sale of land absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party; for the trust not being declared by writing, 's void. *id*

13. A trust must be manifested and proved by writing, or it is void within the statute of frauds. *id*

FRAUDS, STATUTE OF.

See 'Trust.

G

GAOL LIBERTIES.

See Escape.

GOODS SOLD.

See Partnership.

H

HABEAS CORPUS.

A cause being removed by *habeas corpus* from the common pleas to this court, the former have no jurisdiction till a *procedendo* filed; and till this be done, any proceeding in the cause in the court below is irregular. *Smith, matter of.* 27

See Costs, 18.

HABERE FACIAS POSSESSIONEM.

See Ejectment, 3, 4.

HUSBAND AND WIFE.

1. The wife's equity, as it is called, cannot be disposed of by the husband, without first making a suitable provision for her support. *Udall v. Kenney.* 590

2. Though the wife should join the husband in the assignment of it, this will not render the disposition valid, she being an infant. *id*

3. The only way in which she can herself dispose of it, is by consent in court, or out of court, on an adequate provision being made for her. *id*

4. Otherwise as to a wife's choses in possession, or in action. Of the former, the husband is absolute owner by the marriage; and so of the latter, when reduced into his possession. *id*

5. It seems, that when the property of the wife is the subject of an action at law, equity will not interfere, by injunction or otherwise, so as to prevent the husband

getting possession till he make proper provision for his wife. *id*

6. But if the aid of a court of equity be necessary to enable the husband to get possession of his wife's property the court will see, when he comes there for that purpose, that he first make a suitable provision for her; or it will interfere, at her suit, to prevent his getting possession, in any way, till such provision is made. *id*

7. So of the general assignee of the husband, by his own act, with or without valuable consideration, or by operation of law. *id*

8. So of a specific assignee for valuable consideration, with or without notice of the wife's equitable claim. *id*

9. Cases on the three last heads considered in chronological order, by SAVAGE, Ch. J. *id*

10. In all these cases, the extent of the provision for the wife is properly the subject of reference to a master, and must depend on circumstances; and the husband, or his assignee, is entitled to what remains after provision made. *id*

11. The general rule is, that the interest or income of the wife's equitable property, may be received by the husband, while he lives with and maintains her. *id*

12. But if he neglects to do this; or if he ran away with and married her while she was a ward of the court; or has shewn incapacity to manage his concerns, or a disposition to squander his wife's property, the court will direct the interest to be paid to her, or to a trustee for her benefit. *id*

13. While, however, he has a right to receive the interest or income of his wife's property, he may transfer that right to another for valuable consideration, who shall not be holden to account to the wife, especially if such right of the husband or assignee be sanctioned by an order of court. *id*

14. It seems, that inadequacy of price, alone, is not a sufficient ground for setting a contract aside. *id*

15. Bank stock was settled by a father, by deed declaring a trust in favour of his infant daughter, and by an order of the court of chancery, was placed in the hands of the assistant register of that court, as

trustee to execute the trust in her favour. She married, and an order of the court was made to pay the dividends of the stock to the husband. Within a year after the marriage, and while she was an infant, she and her husband transferred the stock for a valuable consideration, the assignee knowing at the same time of the deed of settlement and the infancy of the wife; whereupon an order was made, that the dividends should thereafter be paid to the assignee till the wife came of age, or the further order of the court. On a bill filed, by the wife, against the husband and assignee, the court of chancery declared the assignment null and void, so far as it respected the wife's equity; and decreed that the assignee should account for the dividends received by him under the order. And, the husband having misbehaved himself, the dividends were directed to be paid to the wife, until she came of age, with liberty for her then to apply for such suitable provision, out of the property, as might be determined on the usual reference to a master. On appeal to the court of errors, the decree was affirmed, except so much as directed the assignee to account for dividends received anterior to the decree; and the wife in the mean time having come of age, the record was remitted with directions to the court below to make the proper reference, and determine what would be a suitable provision; the overplus, if any, to be paid to the assignee. And the chief justice intimated, in delivering the opinion of the court, that if the wife had no fortune beside the stock, which was \$8000, the whole would not exceed a reasonable provision. *id*

See Feme Covert. Maintenance and Champerty.

I

INJUNCTION.

An injunction should not be granted, in order to secure a claim to statute privileges, if the right be doubtful. *N. R. Steam Boat Company v. Livingston.* 713

IMPROVEMENTS.

See Ejectment, 74

INQUEST BY DEFAULT AT CIRCUIT.

See Practice, 13.

INQUIRY, WRIT OF.

See Bond to perform Covenants,
2, 3.

INSOLVENT.

1. To avail himself of a discharge of the person from imprisonment, the defendant should plead such discharge; or he may give it in evidence on the trial, and if found valid, this finding should make a part of the postea, on which a modified judgment may be entered. But where this course was overruled by the circuit judge, and the plaintiff did not express a desire to contest the discharge at the circuit, nor impeached it by affidavit, on motion, in the supreme court, to have the judgment qualified, the motion was granted. *Robertson v. Crowell.* 13
2. On an application for a discharge, under the act to abolish imprisonment for debt in certain cases, (*sess. 42, ch. 101*) and order for 10 weeks' advertisement to creditors, and a publication of only 6 weeks, and then an order, by mistake, for assignment, which is made, the second order is a nullity, being made without jurisdiction, and the commissioner may refuse to sign the discharge. *Underwood, matter of.* 59
3. A discharge under the act for giving relief in cases of insolvency, (*1 R. L. 464, §. 9.*) passed April 12th, 1813, is a bar to an action on a contract made in this state subsequent to that day. *Raymond v. Merchant.* 147
4. A promissory negotiable note given for an antecedent debt, is not absolutely an extinguishment of that debt; but an action may still be maintained for the original consideration, provided the note be lost, or produced and cancelled at the trial. *id*
5. Where such antecedent debt was contracted in this state, subsequent to the act for giving relief in cases of insolvency; and a negotiable note was afterwards given for that debt in the state of Vermont; held, that a discharge under that act was a bar to an action on the note, the original consideration of which might be inquired into in reference to the discharge. *id*
6. An inventory and affidavit of a debt, made by an insolvent, before a commissioner, in order to obtain his discharge, (which is granted) under the insolvent act, is a sufficient acknowledgment to take the debt out of the statute of limitations. *Bryon v. Wileocks.* 159

7. An action on a note given Feb. 6th, 1812, just before the repeal of the insolvent act of 1811, which was repealed Feb. 14, 1812, is barred by a discharge under the insolvent act of April 12, 1813. *id*

8. The act for the relief of debtors, with respect to the imprisonment of their persons, (*1 R. L. 348, s. 4*) extends to debtors in execution on judgments founded on wrongs as well as on contracts; e. g. on an assault and battery. *People v. Marine Court.* 366

See Execution, 5.

INSURANCE.

1. The contract in a valued policy, is to pay the assured the whole valuation, if the subject of the policy be lost; and the valuation in the policy is conclusive as to the amount of recovery, if the subject be lost by the perils insured against, unless there be fraud or imposition in fixing the value. *Whitney v. Am. Ins. Co.* 210
2. Where the insurance was of goods, valued at \$14,000, on board a ship, and the returns of those goods on a voyage out and home; and the goods, in the course of the voyage round, were delivered to L, upon his advance of \$7,000, and his receipt, promising to answer drafts of the assured to \$3,000 more; the goods to be sold by L, for his reimbursement, and the proceeds remitted to the assured; and the \$7,000 were vested in a return cargo, together with \$1621, for which he drew on L, making, in the whole, an investment to \$8469.85; and L paid the draft as he had agreed; and the return cargo was lost by the perils insured against; and the outward cargo, on actual sale, did not bring enough to reimburse L, by \$4680.26, for which he drew on the assured; held, that the assured was entitled to recover, as for a total loss, the \$14,000 and interest. *id*
3. But it would be otherwise, if part only of the value of the goods had been invested in the return cargo. *id*

See Pleas and Pleading, 5 to 19.

INTEREST.

1. Rule for casting interest where the bond is payable by instalments, and the interest,

though it runs from the date, is not demandable till the instalment falls due, and a payment is made on an instalment not due and payable. *Williams v. Houghtaling*. 86

2. On the 1st of May, 1812, the president, &c. of the *Rensselaer Glass Factory*, a company engaged extensively in the manufacture of glass, entered into co-partnership, for a year, with R and A, two stockholders, in conducting the concern, R and A to make the necessary advances in money, and receive interest. On the 1st of May, 1813, the company appointed R their general agent, large advances being necessary to carry on their business. No salary was agreed on; but a previous agent had received a salary of \$1250 per annum, and this was no more than a reasonable compensation for R's services, while agent, until the factory was destroyed by fire, on the 3d May, 1815. R continued agent from the 1st May, 1813, till his death, in August, 1821, residing in the vicinity of his principals, who occasionally met at his house. During the period of his agency, he made necessary cash advances in and about carrying on the concerns of the company, to more than \$100,000, which he had charged in an account of more than 500 items, and had received in cash nearly the same amount, which he credited in the same book, in upwards of 700 items. He never rendered any account to the company; nor did he apprise them that they were in arrear until the 2d Jan. 1819, when he was requested by one or more of the directors to present his account; which request was afterwards repeated by one or more of the directors, but never complied with. On his death, his personal representative claimed interest on the advances, as well as on the salary or compensation for his services. *Held*, that she should recover interest upon the advances to the 2d Jan. 1819, when he was requested to make out his account, but not after. *Held*, also, that she should not recover interest on the salary. *Reid v. Renss. Glass Factory*. 393

3. As a general rule, interest is allowable on cash advances, though they rest in the form of a mutual, current, unliquidated account. *id*

4. Whether such charges come strictly within the definition of an account? *Quere*. *id*

5. Interest is not allowable on an unliquidated account for work and labor. *id*

6. The English and American cases examined at large, by the court and counsel, in reference to the following heads: 1. Interest on money lent. 2. On money paid, &c. or advanced. 3. On money had and received. 4. On money due for work, labor and services. 5. For goods, &c. sold and delivered. 6. On open, current, unliquidated accounts. 7. On an account stated, or balance struck. 8. The general principles upon which interest is chargeable. *id*

7. General rule of the supreme court, as to casting interest, where partial payments are made at different times, with the American cases on this subject generally. 87, note (a)

See Usury.

J

JUDGMENT.

See Amendment, 1, 2. Assignee. Bond and Warrant of Attorney. Judgment as in case of Nonsuit, Practice, 9, 10, 11, 15, 17, 20.

JUDGMENT AS IN CASE OF NON-SUIT.

1. After first default in trying cause, plaintiff offers, if defendant will make out his bill, to stipulate and pay costs of circuit. Defendant does not make out his bill, but moves for judgment as in case of nonsuit; and rule that the plaintiff stipulate and pay costs of circuit, but that defendant pay costs of motion. *Jackson v. Hooker*. 15

2. Applications to this court, in cases where a party may have the effect of his motion without coming here, are to be discountenanced. *id*

3. The people can not be nonsuited. *The People v. Thurman*. 16

4. In this respect, as well as in many others, they enjoy the prerogatives of the British crown. *id*

JUDGMENT AND EXECUTION.

See Time.

JURISDICTION

1. To give a justice jurisdiction upon attachment, proof the defendant is concerned, &c. And if the attachment out such proof, and be proceeding being void plaintiff are trespassers.
2. So, come *semble*, if given, or mere blame the surety.
3. In trespass against attachments and execution void, it appeared levied and sold other executions upon which he is time, and the executions indiscriminate executions, as satisfied by the to the plaintiff against the just
4. When the liable as a he has jurisdiction of it.
5. In trespass process, but goods are officer in part, that where, is reason were in

J

See A

1. T
f
o
c

devises has entered upon the lands, and promised to pay it. *Kelsey v. Deyo*. 133

2. Part payment is conclusive evidence of such a promise. *id*
3. So where, from the whole will, it appears to have been the intention of the testator that the legacy should be a charge on the land devised; although the land was not expressly charged with its payment. *id*
4. Where a testator bequeathed his personal estate to his wife for life; and what should remain of this at her decease, over, to be equally divided between all his children; and then devised his real estate to one of his sons; and bequeathed certain legacies, in money, to his other children, to be paid by his son, the one half to be paid in two years after his (the testator's) decease; and made his son, the devisee, with others, executors; and his son entered into possession, and paid part of one of the legacies; *held*, that an action lay for the residue of this legacy. *id*

LEVY.

See Execution, 1, 6, 8, 9, 10.

LIEN.

See Execution, 2 to 5.

LIMITATION, STATUTE OF.

See Insolvent, 6. Pleas and Pleadings, 20 to 30.

LOANS, COMMISSIONERS OF.

See Mortgage.

LOST NOTE.

See Promissory Note, 10 to 14.

MAINTENANCE AND CHAMPERTY.

1. H. T. who claimed land as heir at law of his father, and who was about to commence suits to recover the possession of it, entered into an agreement with the plaintiff, who had married his sister, by which he covenanted, in consideration of the premises, &c. to convey to the plaintiff the one fourth part of the property which

should be recovered; and the plaintiff, in consideration of such covenant, &c. promised H. T. to pay, bear and sustain, the one half of all the expenses which might occur in the prosecution of the intended suits, &c. The defendant, who drew the agreement, and subscribed it as a witness, as attorney of H. T. and the plaintiff, brought actions of ejectment against the persons in possession of the land; and afterwards, by virtue of a power of attorney from H. T. for that purpose, but without the knowledge of the plaintiff, compromised with the tenants, and received from them a large sum of money. *Thalhimer v. Brinckerhoff*. 623

2. In an action of assumpsit for money had and received to the use of the plaintiff, brought by him to recover one fourth part of the money so received by the defendant; *held*, that the agreement between the plaintiff and H. T. was valid, and not illegal and void within the provisions of the act to prevent and punish champerty and maintenance, (*sess.* 24, *ch.* 87, 1 R. L. 172) and that the plaintiff could, therefore, recover against the defendant. *id*
3. *Held*, also, that general *indebitatus assumpsit*, for money had and received, was the proper form of action. *id*
4. *Held*, also, that the non-joinder of H. T. was no objection. *id*
5. History of the law in relation to champerty, maintenance and barratry. *id*
6. It was a principle of the common law, that a chose in action could not be transferred; but this is now reversed; though at this day a part of a chose in action can not be transferred. *id*
7. The common law rule never prevailed in courts of equity. *id*
8. To maintain the suit of another, is unlawful, unless the person maintaining has some interest in the subject of the suit, distinct from what he may acquire by the agreement to maintain, or is connected with the suitor in some social relation; but where one has such an interest, whether it be great or small, vested or contingent, certain or uncertain, he may maintain. So, where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the latter may maintain. *id*

9. The relation of landlord and tenant, master and servant, acts of charity to the poor, and the exercise of the legal profession, are also cases in which it is lawful to maintain.

10. The laws against champerty, &c. are intended to prevent the interference of strangers, having no pretence of interest in the subject of the suit, and stand in relation of duty to the suitor.

11. The above rules and exceptions apply both to champerty and maintenance, the latter being the generic term, and champerty, which is maintenance in a particular form, viz. upon a contract to divide the subject of the suit.

12. A husband whose wife is incapable, or a child, may maintain the suit of the wife or child to recover the land, upon which they have part of the land.

MANDAM

1. On setting aside a case, the court of common law may grant a writ of mandamus against a party against whom it is shown that he would not be bound by the judgment; and on motion for a writ of mandamus requiring a condition, *held*, that the discretion in the case of this court would be a *matter of*.

2. Under the 7th section of the constitution, the common pleas have jurisdiction to hear a case of justice of the peace, and the court will not *Johnson, Ex*.

See Bill of

See Fran
I

NEW TRIAL.

See Practice, 11.

NOLLE PROSEQUI.

See Damages, 4. Practice, 20, 21.

NON DAMNIFICATUS.

See Pleas and Pleading, 22, 26.

NONFEASANCE.

See Action, 1, 2.

NONJOINER.

See Maintenance and Champerty, 4.

NON PROS.

See Certiorari, 3.

NONRESIDENT.

See Costs, 9.

NONSUIT.

See Judgment as in case of Nonsuit.

NOTICE.

See Appeal, 4, 5. Practice, 1.

O

OFFICE.

See Constitutional Law, 1 to 10.

ORDER TO STAY PROCEEDINGS.

1. A circuit judge may grant an order for a stay of proceedings till the further order of this court, upon a verdict, &c. though before a case settled. *Rose v. Bates.* 28
2. An order to stay proceedings upon a case made for the purpose of obtaining a new trial, granted by a commissioner to perform the chamber duties of a judge of the supreme court, is not a nullity; but is val-

id till revoked by the commissioner or set aside by the court. *Jackson v. Jackson.* 73

P

PARENT AND CHILD.

See Fraud and Undue Influence.

PARTIES.

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be made parties to a bill in equity, if within the jurisdiction of the court; but to a bill filed by one to set aside a deed of bargain and sale absolute on its face, though the parties agreed by parol that it should be in trust for another, the latter need not be made a party; for the trust, not being declared by writing, is void. *Whelan v. Whelan.* 537

See Fraud and Undue Influence, 12. Partnership, 1.

PARTIES TO BILL IN CHANCERY.

See Fraud and Undue Influence, 12. Parties.

PARTNERSHIP.

1. A dormant partner need not be named as plaintiff in assumpsit for goods sold, founded on a contract at the time of making which, his interest was unknown to the defendant. *Clarkson v. Carter.* 84
2. On releasing or selling his interest to his co-partner, he is a competent witness for the latter. *id*

PAYING MONEY INTO COURT.

See Practice, 2, 3, 4.

PAYMENT.

See Insolvent, 4. Promissory Note, 8, 9.

PENALTY.

See Bond.

PEOPLE.

See Judgment as in case of Non-suit, 3, 4.

PETIT LARCENY.

See Larceny.

PLEA.

See Pleas and Pleading, 1, 2, 3, 4, 6, 9, 11, 12, 13, 14, 20, 22, 24, 25, 26, 27, 28, 29, 30.

PLEA PUIS DARREIN CONTINUANCE.

See Pleas and Pleading, 1, 2, 3, 4.

PLEADINGS IN CHANCERY.

See Fraud and Undue Influence, 2, 12.

PLEAS AND PLEADING.

1. Matter of defence arising after issue joined must be pleaded *puis darrein continuance*. *Jackson v. Ramsey*. 75
2. This rule applies as well to ejectment as to other actions; as where the defendant requires title by deed after issue. *id*
3. But where B. purchased the premises at sheriff's sale on a judgment and execution against M. and took no deed; and then M's devisee brought ejectment, after issue joined in which, B. obtained a sheriff's deed; *held*, that this need not be pleaded; but might be given in evidence upon the general issue. *id*
4. On demurrer, the party who commits the first substantial fault in pleading, shall have judgment against him. *Griswold v. The Nat. Ins. Co.* 96
5. A plea which is bad in substance is not aided by a replication. *id*
6. In declaring upon a contract, which is sufficiently stated in the first count, it need not be repeated in the subsequent counts of the same declaration; but it is enough to declare that it is the same as is set forth in the first count; and per *Woodworth, J.* interrupting *Wells*, counsel, S. P. *id*
7. Thus, where the plaintiff declared upon a policy of insurance, setting it out in the first count, and in the subsequent counts declared as upon another policy "for the same voyage, and upon the same subject matter, and upon the same terms and stipulations, and containing therein to the same effect as in the said policy of insurance in the said first count mentioned, &c." *held*, that the subsequent counts were good. *id*
8. Form of pleading a survey upon a vessel, according to the rotten clause in a policy of insurance. *Note (a)*. *id* 97
9. Such a survey is properly made within a reasonable time after the vessel's arrival at her port of destination—it need not be made before. *id* 96
10. In pleading such a survey, the defendant need not state the particular manner and circumstances of the survey, but merely that it was regular—circumstances of impeachment come more properly from the assured, if he have a right to impeach the survey at all, as to which, *Quere*. *id*
11. An averment that the ship was by such survey declared unseaworthy, by reason of being rotten, is sufficient, within the rotten clause; *id*
12. But an averment that the ship was found by the survey to be in a very bad and rotten condition, is not good. It implies a mixed cause of unseaworthiness; whereas, to make a survey a flat bar within the rotten clause, it should appear plainly that the unseaworthiness arose from rottenness solely. *id*
13. Matter which comes more properly from the plaintiff, need not be stated in the plea. *id*
14. A survey is always made at the instance, and for the benefit of the owner or master of the vessel, and goes, of course, into his hands. The assurers are not parties to the survey. *id*
15. It is proper, but not indispensable, for a survey to state the particulars of the decay. *id*
16. The plea stated a survey made at *Cadix*, and the replication traversed that the survey was made at *Cadix*, or elsewhere; *held*, bad on special demurrer. *id*
17. The issue must be as broad as the tr-

verse, and a rejoinder to such a replication would be a departure. *id*

19. Declaration, averring a physical total loss of a ship; plea, a survey at *Catiz*, the port of destination: replication, a different survey at *Cadix*, and traversing the survey in the plea; *held*, a departure; for the ship arriving at her port of destination, there could not be a physical total loss. *id*

20. First count of *narr.* on bond from gaoler, and his sureties, debts, to the sheriff, *plff.* stating condition, that if the former executed his trust, and would not suffer any prisoners to escape, then, &c. averring that *O. S. T.* was committed to gaol on *ca. sa.* at the suit of *O. H.* and gaoler negligently suffered him to escape, whereby the plaintiff sustained damages to \$5000. Second count the same; averring also a suit against the sheriff for the escape, and judgment against him; and notice to the defendants of the pendency of that suit, whereby the plaintiff had sustained damages to \$5000. Pleas to first count, 1. That gaoler did not permit *O. S. T.* to escape. 2. That *O. S. T.* was not committed, and issue to the country on both pleas. 3. That *O. H.* plaintiff in the *ca. sa.* permitted *O. S. T.* to escape, concluding with a verification. 4. That *O. H.* did not sue the sheriff within one year after escape; and that the sheriff sustained no damage from the escape within the year, concluding with a verification. Pleas to the second count, 1. No escape, and that defendants had no notice of suit pending, concluding with a verification. 2. No commitment; and no notice of suit pending, with the like conclusion. 3. That *O. H.* permitted the escape; and no notice of suit pending, with the like conclusion. 4. That *O. H.* did not sue sheriff in one year from time of escape, no notice of suit pending; and that sheriff neglected to avail himself of statute of limitation, with the like conclusion. Replications to the 3d plea to 1st count, and issue to the country. To 4th plea to 1st count, judgment against the sheriff for the escape, and notice to defendants of the suit pending, concluding with a verification. To 3d plea to 2d count, and issue to the country. Rejoinder to replication to 4th plea to 1st count, denying notice of the suit pending; and averring that it was defended without defendant's knowledge; that sheriff neglected to avail himself of statute of limitation. On special demurrers to the 1st, 2d and 4th pleas to the 2d count, and to the rejoinder to the replication to the 4th plea to the

1st count, *held*, that the rejoinder was not double, within the rule which denies the right to include two distinct and independent matters, requiring two separate answers, in the same pleading; that the several facts contained in it were connected and dependent, all tending to the point of defence sought to be introduced, viz. that judgment against the plaintiff was recovered through his default, in not availing himself of the statute of limitation, (1 *R. L.* 427, s. 26.) *McChure v. Erwin.* 313

21. *Held*, also, that the rejoinder properly concluded with a verification; inasmuch as it introduced new matter, viz. the neglect of the plaintiff in not setting up a proper defence to the action for the escape, which matter was not set up in the plea. *id*

22. But *held*, also, that the plea, being properly one of *non damnificatus*, was bad, as being inapplicable to the condition of the bond, and the breach assigned; *id*

23. Also, that the matter of substance set up in the rejoinder, viz. want of notice, neglect, &c. were no bar even when taken in connexion with the plea which it followed. *id*

24. *Held*, also, that the 4th plea to the 2d count was bad for the same reasons; and *id*

25. That the 1st and 2d pleas to the 2d count were defective in form; inasmuch as they were a mere denial of the substance of the declaration, and should, therefore, have concluded to the country. *id*

26. The plea of *non damnificatus* is applicable to an action on a bond to *save harmless* and *indemnify* the obligee, but to an action on no other bond. *id*

27. A gaoler, who has given a bond to his principal, the sheriff, not to permit an escape, can not defend himself against an action for the breach of that condition, upon the ground that in an action against the sheriff, for an escape which the gaoler had permitted, the former neglected to plead the statute of limitation, which had run against the action. *id*

28. A plea, &c. which introduces several facts, all of which are necessary to constitute but one point of defence, is not bad for duplicity. *id*

30. But where it denies the whole substance of the plaintiff's declaration, it should conclude to the country. *id*

31. The declaration stated that the bank of *Utica* had, pursuant to the act of the legislature, passed the 10th day of *April*, 1815, established an office of discount and deposit in *Canandaigua*. *Held*, a sufficient recital of the act in pleading, though it should be considered a private act; especially after verdict. *Bank of Utica v. Smedes*. 662

32. The declaration alleged that the defendants had undertaken to charge the 1st endorser of notes payable on demand; and set forth this first endorsement of the notes to the plaintiffs as having been made on a day certain—the endorsement and delivery of the notes, by the plaintiffs, to the defendants, about six months thereafter—and their undertaking at the latter time. *Held* sufficient, especially after verdict, though the declaration did not aver that the demand of payment was made within a reasonable time. *id*

33. The power of a verdict to cure formal defects in pleading, should be liberally applied. *id*

See Damages, 3, 4. Insolvent, 1. Promissory note, 5. Slander.

POLICY OF INSURANCE.

See Insurance.

POLLING JURY.

See Jury, 1.

POOR.

The purchase of an equitable interest in lands, and paying \$75, constitute a settlement; but this must be an indefeasible interest, derived from a grantor having title. *Bridgewater v. Brookfield*. 299

POSSESSION.

See Fraud.

See Devise.

PRACTICE.

1. H. and W. attorneys, being partners, issued a *cap. ad. resp.* on which the defendant endorsed his appearance, in the name of W, as attorney, filed a declaration, and entered a rule to plead as on the motion of H and W, and gave notice thereof in the name of W. The defendant's attorney searched the common rule book (W.) found no rule entered, and neglected to plead, the rule being entered in rule book (H.) and a default was, therefore, entered, for want of a plea; and because the defendant was misled, the court set aside the default, without costs. *Stewart v. Atkins*. 67

2. Forms and practice, on paying money into court. *Bank of Columbia v. Southland*. 336

3. The sum paid is to be deemed stricken out of the declaration, and unless a larger sum is proved by the plaintiff, at the trial, verdict should be for the defendant. *id*

4. But where, in such case, a verdict is taken for the plaintiff, subject to the question of practice, to be settled by this court, that question must be determined on a case made—not as a non-enumerated motion. *id*

5. Practice as to taking bail on recognizance upon arrest by attachment for contempt. *The People v. Telfr*. 340

6. A defendant being arrested by attachment, for a contempt merely technical, and offering to give bail for his appearance, but the sheriff declining to go with him before a judge for this purpose, and having appeared and answered interrogatories, was discharged, on payment of costs, not including the sheriff's fees for attendance upon the attachment. *id*

7. When, how, before whom, bail on attachment should be taken; and the duty of the officer taking it. *id*

8. What the sheriff should do on arrest. Party's own recognizance to be taken, or plaintiff may demand bail. *id*

9. A judgment of this court is perfect after 4 days from the time of entering a rule for judgment, though the record be not filed. *Grant v. Root*. 354

10. After this, a commissioner has not the power to order a stay of proceedings, with a view to a motion for a new trial ; *id*
11. But where the practice, on this head, was mistaken by the attorney, the court set aside the proceedings, and granted liberty to move for a new trial, on payment of costs. *id*
12. A case can not be turned into a special verdict, unless there be a stipulation to this effect at the trial. *Woolsey v. Camp*. 358
13. The defendant may appear at the circuit, after the jury are impanelled for an inquest by default. *Mirwan v. Ingersoll*. 367
14. A special verdict, finding that the defendant does not appear, nor offer any evidence in support of his plea, is a nullity. *id*
15. The plaintiff can not take judgment, of course, upon a special verdict, but it should be on motion in court. *id*
16. On reversing a judgment upon error, the plaintiff is entitled to costs. *Macaulley v. Sternburgh*. 368
17. And he may perfect his judgment and issue execution for them immediately, without waiting for the final event upon a venire de novo awarded. *id*
18. On executing a writ of inquiry under the statute, (1 R. L. 343, s. 3.) judgment being affirmed on error, and the record being remitted, a new judgment record is not necessary ; but the proceedings may be continued at the foot of the original roll. *Jackson v. Rathbone*. 373
19. How this is to be done. May be on separate paper, and attached to record, as in assigning breaches, lotteries, &c. after judgment on bond to perform covenants, or court, on motion, would allow record on file to be continued, &c. *id*
20. In assumpsit against three, on a joint and several promissory note, two pleaded that the note was fraudulently and oppressively obtained, upon which the plaintiff entered a *nolle prosequi* as to them, and took judgment by default against the third ; held, that the action was discontinued as to all. *Hall v. Rochester*. 374
21. In actions *ex contractu*, against several, unless the defence as to one go merely to his personal discharge, a *nolle prosequi* can not be entered as to him, and the suit be continued as to another. *id*
22. In debt upon the 4th section of the act for the prevention of frauds, (1 R. L. 76) whether the jury should find the value of the goods ? *Quera. Warner q. t. v. Tooker*. 386
23. If they omit this, and find for the plaintiff generally, the verdict is not void ; and a judgment thereon will not be set aside for irregularity. *id*
24. If the defendant have any remedy, it is by writ of error. *id*
25. If a verdict be irregular, the party should move to set it aside the next term after it is rendered. *id*
26. Objections not taken in the supreme court, can not be taken in the court of errors. *Bank of Utica v. Smedes*. 662
27. An order of the court of chancery was, as to part of the right, against the appellants, from which they appealed ; and, as to another part, in their favor, from which neither party appealed ; held, that though the respondent could not question that part of the order which was for the appellants, yet he might argue against the reasons and ground upon which it was made, it appearing that if they failed there could be no foundation for the appeal. *N. R. Steam Boat Co. v. Livingston*. 713
28. A judge allowed to withdraw from his seat, he being interested. *id*
29. So where he had relations who were interested. *id*
30. But this privilege was denied to a judge who requested to withdraw upon the ground that he had formed and expressed an opinion. *id*

See Amendment. Bond and Warrant of Attorney. Calendar. Certiorari. Costs. Damages, 3, 4. Ejectment, 1, 3, 4, 5, 6, 7. Evidence, 1, 2. Insolvent, 1, 2. Judgment as in case of Nonsuit. Order to stay Proceedings. Quo warranto. Reference. Sheriff. Slander, 4. Venue.

PREROGATIVE.

See Judgment as in case of Nonsuit,
3, 4.

PRISONER.

See Escape.

PRIVILEGE.

See Attorney, 4. Witness.

PROCEDENDO.

See Habeas Corpus.

PROMISSORY NOTE.

1. W purchased a note of M, who endorsed it in blank, before due; W sold it to another before due, who charged the endorser by demand and notice, &c.; and, after it was due, W re-purchased it, and sold it to I; held, that I might maintain an action on the note, against the endorser, in his (I's) own name. *Williams v. Matthews.* 252

2. A note is endorsed and dishonored, and the endorser charged by demand and notice. This is no objection to a further negotiation of the note, and any subsequent holder may sue, in his own name, either the maker or the endorser who has been so charged; and the original demand of the maker, and notice to the endorser, enures to the benefit of all subsequent holders. *id*

3. The only difference between negotiable paper which has been dishonored, and that which is not yet due, is, that the former must be taken subject to all the equities existing between those who were parties before the paper became due. *id*

4. The holder of a note endorsed in blank, may fill it up before or at the trial, with what name he pleases. Other parties to the note, (e. g. a prior endorser) have no concern with this question. *id*

5. A count by endorsee against endorser, averring a demand of payment, and notice of non-payment, in the usual form, is satisfied by proving a state of facts which dispenses with actual demand, &c. and shewing due diligence, &c. The facts need not be specially stated in pleading. *id*

6. A demand of payment, and notice of non-payment, should be made and given by the holder of a note, or his agent. *id*

7. Where the 3d day of grace is Saturday, notice of non-payment need not be given till Monday. *id*

8. The acceptance of the note of a third person, on the sale of a chattel, for the consideration money, is payment. *Rew v. Barber.* 272

9. It is equivalent to the payment of money, and on a failure of title, an action lies for money had and received, to recover the amount of the consideration money, and interest. *id*

10. An action at law can not be sustained on a negotiable promissory note payable to bearer, by the holder, on his proving that the note was lost, though he shew that he lost it after it became due. *Rouley v. Ball.* 303

11. His only remedy is in a court of equity, which alone can afford the defendant adequate protection against future liability. *id*

12. But if he shew that the note was, in fact, destroyed, he may recover in a court of law. *id*

13. So, if the note be not negotiable, or if negotiable, and it appear not to have been negotiated. *id*

14. What is sufficient proof of the execution of a lost note. *id*

15. What is a reasonable time, within which a note payable on demand should be presented for payment, in order to charge an endorser, depends on all the facts of the case, to be proved at the trial. *Bank of Utica v. Smedes.* 662

See Action, 1, 2. Damages, 1, 3. Insolvent, 4, 5, 7. Practice, 20, 21. Witness.

PUNISHMENT.

See Constitutional Law, 1 to 10. Larceny.

1. A
th
2. A
be
to
Ja
3. Th
mov
inst
but
him
nam
mov
move
refer
4. The
appoi
L. 51
the ju
might
The R

VOL.

QUO WARRANTO.

1. On filing an information in nature of a *quo warranto*, the court granted a rule that the defendant appear and plead in 20 days after service of a copy of the information, and notice of the rule, or that the attorney general have leave to enter an appearance for him, and take judgment by *nihil dicit*. *People v. Richardson*. 357
2. But on the question coming again before the court, this case was re-considered, and it was held that process should issue.
Post. vol. 4, S. C.

R

RECEIPT.

See Lease.

RECOGNIZANCE.

See Practice, 5, 6, 7, 8.

REDEMPTION.

See Execution, 2 to 5.

REFERENCE.

1. An affidavit for a reference should state that issue is joined. *Jansen v. Tappen*. 34
2. A reference will not be granted, if there be a demurrer in the cause, which relates to the whole action, and is undetermined. *Jansen v. Tappen*. 339
3. The party against whom a reference is moved, may nominate one of the referees, instead of any one named in the notice; but he can not, by shewing cause, entitle himself to a further nomination. If a name is rejected for cause, it lies with the mover to nominate a substitute. So the mover is always entitled to nominate two referees. *Backus v. Smith*. 344
4. The facts which appeared before referees appointed pursuant to the statute, (1 R. L. 516, s. 2) ordered to be entered upon the judgment record, so that the party might review the case on error. *Reid v. The Rensselaer Glass Factory*. 387

See Costs, 6.

RELATION.

See Bond and Warrant of Attorney. Deed.

RELEASE.

1. A bond or covenant, by the creditor, to save harmless and indemnify the debtor against the debt, operates as a release of the debt. *Clark v. Bush*. 151
2. A and B gave a note to C, of \$2000; and then B and C became bound in the penalty of \$3000, to indemnify A against all the partnership debts due from A and B, the \$2000 debt due to C being one of them, and C paid under this bond to the amount of the penalty, by way of indemnifying A against other debts due from the firm of A and B, and then brought his action against A upon the note to C. *Held*, that he should recover; for he shall not be holden to pay beyond the penalty of his bond; more especially as he was a mere surety; and the bond shall not operate as a release of a debt which he could not be called upon to pay. *id*

REPLEVIN.

See Distress.

REPLICATION.

See Pleas and Pleading, 6, 17, 19, 20.

RES JUDICATA.

See Evidence, 3 to 8.

RETURN.

See Appeal, 2, 4, 5. Certiorari, 1, 2, 4.

RIVERS.

See Constitutional Law, 20.

RULE.

General rule as to frivolous bills of exception. 439

RULE ENTERING.

See Practice, 1.

RULE TO PRODUCE PAPERS.

See Evidence, 1, 2.

S

SALE.

See Mortgage, 4, 5, 6.

SALE OF GOODS AND CHATTELS.

1. On a cash sale of goods, the vendee is not entitled to possession till he pays the price. *Clarkson v. Carter.* 84
2. Rights of vendor and vendee, in this respect, considered, where earnest has or has not been paid. *id*

See Fraud. Warranty.

SETTLEMENT.

See Poor.

SET OFF.

See Assignee.

SETTING ASIDE PROCEEDINGS.

See Costs, 11.

SHERIFF.

1. The sheriff having erred upon the merits, in executing a writ of inquiry, under the 3d section of the act to prevent delays of executions, &c. (1 R. L. 143) the inquisition was set aside on motion. *Jackson v. Rathbone.* 296
2. But the court refused to appoint elizors to execute the writ; though it appeared that both the sheriff and coroner were members of a corporation which was interested in, and had defended another cause, at the suit of the plaintiff in the

writ of inquiry, that depended upon the same questions as those upon which the suit in which the writ issued were determined. *id*

3. *It seems*, that upon such a writ of inquiry, the plaintiff is entitled to recover nominal damages, at all events; and that an inquest which finds for the defendant, will be set aside on that ground alone. *id*

4. On judgment for plaintiff in ejectment, the sheriff and coroner being members of a corporation which claimed to own the premises in question, and had demised them to the defendant, and defended the action at their own expense, through their tenant, the court appointed elizors to execute the writ of possession. *The Same v. Chew.* 294

5. The sheriff sells lands on execution in favor of K. against S, having at the same time some executions on older, and some on younger judgments, against the same defendant; which are paid, excepting the fees. He may retain his fees upon those executions which are on judgments older than K's, but not so as to those which are younger. *Knickerbacker v. Shepherd.* 363

See Deed. Execution, 1, 6, 7, 8, 9, 10, 11, 12. Practice, 5 to 8.

SHERIFF'S DEED.

See Deed. Pleas and Pleading, 1 to 4.

SHERIFF'S SALE.

See Execution, 11, 12.

SLANDER.

1. A count in slander, charging that the defendant uttered and published these words: "He" (meaning the said I, the plaintiff), "has been with a sow; and I (meaning the said C, the defendant) can prove it;" preceded and followed by a recital and averment, that the words were intended to charge the plaintiff with the crime against nature, &c. held sufficient. *Goodrich v. Woolcott.* 231
2. Where words are of doubtful import, the jury are to find their meaning. *id*
3. The office of an innuendo is merely ex-

planatory. It can not enlarge the meaning of words beyond their natural signification. *id*

4. In slander, the defendant gave notice with his plea, that he would prove the words true; which plea he afterwards moved to withdraw, on an affidavit that the notice was given in good faith; motion refused, unless he would swear to the falsity of the notice. *Lent v. Butler.* 370

SPECIFIC PERFORMANCE.

1. Whether a court of chancery shall decree the specific performance of an agreement, or not, is a matter resting in its discretion; but this is a sound legal discretion. *Seymour v. Delancy.* 445
2. The party claiming performance must present a case fair, just and reasonable; the contract to be performed must have been entered into upon adequate consideration; and must be free from fraud, misrepresentation or surprise; and it must not be hard, unconscionable, or unequal. *id*

3. Where the inadequacy of price, in a contract to sell or convey, is so great as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a court of chancery should not carry it into effect. *id*

4. But inadequacy of price, merely, without being such as to prove fraud conclusively, the contract being entered into deliberately, and fair in all its parts, is not an objection to its being executed. *id*

5. The cases upon this point of mere inadequacy cited, and the substance of them stated in chronological order, per SAVAGE, Ch. J. *id*

6. A court of chancery requires stronger reasons for setting aside an agreement, or delivering it up to be cancelled, than would be sufficient to warrant denying a specific performance. *id*

7. So a court of chancery will, in many cases, not disturb an agreement executed, though it might have denied a specific performance. *id*

8. It will order an agreement to be delivered up to be cancelled for fraud, circumvention, or misrepresentation. *id*

9. *Drunkness.* Cases cited by counsel, upon the question, how far this shall operate as a defence against a bill for the specific performance of a contract. *id*

10. On a bill filed by the vendor, to compel a specific performance, it is sufficient, if he can make a good title at the time of the decree, unless he has been quickened by the vendee, or time be of the essence of the contract; as where it relates to stocks or personal chattels. *id*

11. It is, in general no objection, that the vendor's remedy is gone at law, by reason of there being a mortgage on the estate, &c. so that he could not convey a good title at the day fixed upon by the contract. *id*

12. Cases to this point cited in their chronological order, per SAVAGE, Ch. J. *id*

13. It is the peculiar province of courts of equity to interfere, where the remedy is defective at law, if such interference be not against conscience. *id*

STATUTE.

1. In construing a statute, wherever the intention of the legislature can be discovered, it should be followed with reason and discretion, though such construction seem contrary to the letter of the statute. *Jackson v. Collins.* 89

2. Cases illustrating this proposition referred to by the plaintiff's counsel. *id*

3. It seems, that a statute incorporating a bank is, in its nature, a publick statute. *Bank of Ulica v. Smedes.* 662

STATUTES CONSTRUED, EXPLAINED, OR CITED.

- 1819, April 7, Sess. 42, ch. 101. (Insolvent discharge.) 13, 59
- 1801, March 21, Sess. 24, ch. 47, s. 1. (Double Costs.) 17
- 1813, April 9, Sess. 36, ch. 53, s. 1, 2 R. L. 15, 16. (Costs.) 25
- 1813, April 5, Sess. 36, ch. 56, s. 2, 1 R. L. 516, 17. (Reference Costs.) 29
- 1820, April 12, Sess. 43, ch. 184. (Redemption of Lands sold on Execution.) 35, 69, 334
- 1813, April, 5, Sess. 36, ch. 56, s. 7, 1 R. L. 518, 19. (Assignment of Breaches on Bond to Perform Covenants.) 62

1813, <i>April 2</i> , Sess. 36, ch. 10, s. 1, 2 R. L. 506. (Deputy Sheriff Purchasing on Execution.)	89
1808, <i>April 11</i> , Sess. 31, ch. 216. (Loan Office Mortgage.)	241
1813, <i>April 5</i> , Sess. 36, ch. 63, s. 13, 1 R. L. 437. (Distress.)	263
1820, <i>April 13</i> , Sess. 43, ch. 194, s. 7. (Distress.)	263
1815, <i>April 11</i> , Sess. 38, ch. 153. (Distress in the city of New-York.)	263
1813, <i>April 5</i> , Sess. 36, ch. 54, s. 29, 1 R. L. 525. (Tresble Costs.)	346
1818, <i>April 10</i> , Sess. 41, ch. 94, s. 5 (Costs.)	346
1819, <i>April 13</i> , Sess. 42, ch. 246, s. 4. (Conviction a 2d time of Petit Larceny.)	347
1813, <i>April 9</i> , Sess. 36, ch. 83, s. 1, 2 R. L. 29. (Witness' Fees.)	352
1813, <i>April 6</i> , Sess. 36, ch. 72, 2 R. L. 461. (Albany. Taxes.)	358
1813, <i>April 9</i> , Sess. 36, ch. 81, 1 R. L. 348. (Insolvent Prisoner.)	366
1813, <i>April 12</i> , Sess. 36, ch. 94, s. 2, 1 R. L. 34. (Costs.)	369
1824, <i>April 12</i> , Sess. 47, ch. 238, s. 36. (Appeal from a Justice's Court.)	372, 379
1801, <i>March 20</i> , Sess. 24, ch. 25, s. 3. (Judgment Record. Costs.)	337
1813, <i>April 9</i> , Sess. 36, ch. 86, s. 85, 105, 106. (Costs.)	375
1817, <i>April 15</i> , Sess. 40, ch. 249. (Costs.)	375
1820, <i>January 4</i> , Sess. 43, ch. 1. (Costs.)	375
1818, <i>April 10</i> , Sess. 41, ch. 94, s. 5. (Costs.)	375
1818, <i>April 21</i> , Sess. 41, ch. 265. (Costs.)	375
1824, <i>April 12</i> , Sess. 47, ch. 238, s. 33, 43. (Costs.)	375
1813, <i>April 12</i> , Sess. 36, ch. 96, s. 4, 1 R. L. 344. (Costs.)	375
1813, <i>April 12</i> , Sess. 36, ch. 96, s. 14. (Double Costs.)	379
1787, <i>February 26</i> , Sess. 10, ch. 44, s. 4, 1 R. L. 76. (Verdict)	308
1813, <i>April 8</i> , Sess. 36, ch. 80, 1 R. L. 303. (Improvements of Military Lot.)	390
1801, <i>March 30</i> , Sess. 24, ch. 87, 1 R. L. 172. (Champerty.)	623
1813, <i>March 5</i> , Sess. 36, ch. 23, s. 11, 1 R. L. 366. (Devise. Power.)	651

STAYING PROCEEDINGS.

See Order to stay Proceedings,

STAY OF PROCEEDINGS TILL COSTS PAID.

See Costs, 2, 7, 8, 18.

See Constitutional Law, 11 to 21.

STIPULATION NOT TO BRING ACTION.

See Mandamus, 1.

SUPERVISORS.

See Taxes, 3, 4.

SURETY.

See Bond. Escape, Release, Witness.

SURROGATE.

See Executors and Administrators.

SURVEY OF A SHIP.

See Pleas and Pleading, 9, 10, 11, 12, 13, 16, 17, 18, 19.

TAXATION OF COSTS.

See Costs, 3, 4, 6, 17, 20.

TAXES.

1. A resolution of the common council of the city of *Albany*, that certain sums should be raised for the support of the poor, and for the city night watch and lamps, and to pay the interest of the city funded debt, &c. is imperative upon the board of supervisors of the city and county of *Albany*, who are bound to raise such sums upon the city. *Albany, ex parte.* 358
2. They have no right to refuse, on the ground that large sums of money, heretofore raised for these purposes, have been misapplied. *id*
3. The duties of the board of supervisors, in raising monies on vote of towns to destroy noxious animals, &c. (2 R. L. 132, s. 15) and on the certificate of commissioners of highways, to improve roads, (2 R.

L. 280, s.31) placed on the same footing by *A. Spencer*, arg. and adverted to by the court, in delivering their opinion, as illustrating the main question. *id*

4. *It seems*, therefore, that in these and the like cases, the duties of the board of supervisors, in raising money, are merely ministerial. *id*

See Constitutional Law, 21.

TIME.

The law will not notice the fractions of a day, as between the parties, in order to determine whether the judgment record was filed before execution issued, unless to prevent actual injustice. *Small v. M-Chesney*. 19

See Bond and Warrant of Attorney.

TRAVERSE IN PLEADING.

See Pleas and Pleading, 18.

TREBLE COSTS.

See Costs, 12, 13.

TRESPASS.

See Jurisdiction.

TROVER.

See Damages, 2.

TRUST.

A trust in real estate must be manifested and proved by writing, or it is void. *Whelan v. Whelan*. 537

See Fraud and Undue Influence, 12, 13.

U

USURY.

1. Bond, dated *July 26th*, 1815, with condition to pay \$3000, with interest, as follows: \$500, with interest, on the whole sum unpaid, from the *1st October*, 1815, on or before the *1st October*, 1816; and \$500,

more thereof, with interest on the whole sum unpaid, from the *1st day of October next*, on or before the *1st October*, 1817; the residue expressed to be payable in instalments of \$500 yearly in like manner; held, not usurious on the face of the condition, though upon one construction, every instalment would draw interest from the *1st October*, 1815, notwithstanding it might have been previously paid; and thus the 2d instalment might draw 14 per cent. interest, the 3d, 21 per cent. and so in that progression to the last; but to avoid this consequence, held, that the words, "with interest on the whole sum unpaid," should rather be deemed to refer to the interest as well as the principal, and to mean that \$500 was payable on the *1st October*, 1817, together with the interest that accrued on the balance of principal subsequent to the *1st October*, 1815, and remained unpaid. *Archibald v. Thomas*. 284

2. Where a contract admits of two significations, that should be adopted which renders it operative, rather than that which renders it void. *id*
3. If a contract is susceptible of two constructions, one of which will bring it within, and the other without the statute of usury, the latter construction should be adopted. *id*
4. A contract reserving more than legal interest, on its face, is, *prima facie*, evidence of a corrupt agreement, which is the foundation of usury; but this may be repelled by shewing that more than legal interest was reserved by mistake, e. g. a mistake of the scrivener in wording the bond, whether such mistake be of the fact or of the law. *id*
5. The court have the exclusive power of deciding whether a contract be usurious on its face. *id*
6. A contract to pay interest, generally, means the legal standard of interest. *id*

See Interest.

V

VALUED POLICY.

See Insurance.

VENDOR AND VENDEE.

See Sale of Goods and Chattels.
Specific Performance.

VENUE.

1. The affidavit to change the venue must state the advice of counsel as to the materiality of the witnesses. *Johnson v. Rogers.* 14
2. A defendant who is a counsellor of this court, making an affidavit to change the venue, need not swear to the advice of counsel that his witnesses are material. *Cromwell v. Van Rensselaer.* 346
3. For the purposes of the motion, the court will take notice that he is of the degree of counsel. *id*

VERDICT.

See Bond to Perform Covenants, 1, 2. Costs, 11. Ejectment, 4. Jury. Pleas and Pleading, 33. Practice, 12 to 15, 22, 23, 24, 25.

VERDICT SPECIAL.

See Practice, 12.

W

WAIVER.

See Lease.

WARD OF THE COURT.

See Husband and Wife, 12.

WARRANTY.

1. Assumpsit is the proper form of action, where there is a warranty of title express or implied in the sale of a chattel. *Revo v. Barber.* 272
2. A warranty of title is implied on the sale of a chattel. *id*

WAY.

B owned an alley 24 feet wide, between two lots, one owned by *A*, and the other by *H*. *A* built a large brick house on his lot, which extended 12 feet across the alley at one end, and *B* built a fence lengthwise of the alley, on a line corresponding with *A*'s house, so as to narrow the whole alley one half or more, which alley, thus nar-

rowed, *B* used as a way. Then *B* gave a lease in fee to *A*, of the whole 24 feet, describing it as a lot on which *A*'s house partly stood, at a rent of \$15, reserving a way through the alley for himself, his teams, carts, &c.; and the lease was declared to be upon condition that *A* should leave *B* in the unobstructed enjoyment of the way. *Held*, that a continuance of the fence, as *B* had himself made it, was not an obstruction of the way, within the words of the condition; that a reasonable way, for the purposes expressed, was all that *B* could exact; and that his acts, in making the fence, and leasing with the house partly across the alley, were facts from which a jury would be bound to consider the alley, as it was narrowed by the house and fence, the full extent of the way intended by the parties to be reserved; the lessee having a right to reduce all the residue of the alley to his exclusive possession. *Jackson v. Allen.* 229

See Condition.

WIFE.

See Feme Covert. Husband and Wife.

WIFE'S EQUITY.

See Husband and Wife.

WILL.

See Devise. Legacy.

WITNESS.

1. Where a witness is called, and, on objection to his competency, is put on his *oath*, and answers generally, that he is interested, he should be rejected. If the party calling him wishes to shew the nature of the interest, as that it is ideal, or such as will not exclude the witness, he should follow up the examination with particular questions. *Williams v. Matthews.* 252
2. One who held a note endorsed in blank, and sold it to another, without endorsing it, is, after the execution of the note is proved, a competent witness for the holder, in an action by him against the endorser. *id*
3. The fees of a witness attending from a

foreign state are 50 cents a day. *Nichols v. Doty.* 352

4. One attending as a witness from a foreign state, before arbitrators, being arrested by virtue of a *capias ad respondendum*, was discharged absolutely, without being required to file common bail. *Sanford v. Chase.* 381

5. The court of common pleas, on motion, at the trial, are bound to discharge a sure-

ty for the prosecution of an appeal, and substitute other competent security; so that the first may be a witness for the appellant. *Tompkins v. Curtis.* 251

See Partnership, 2.

WRIT OF INQUIRY.

See Bond to perform Covenants' Practice, 18, 19. Sheriff, 1, 2, 3.

END OF VOLUME THIRD.

Ex. 10/13/03.

B. H. L.









